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1251

Vol 2329
**United States
Circuit Court of Appeals**

For the Ninth Circuit. /

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellant,

vs.

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellee,

And

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellee.

Apostles on Appeal

In Two Volumes

VOLUME I

Pages 1 to 462

**Upon Appeal from the District Court of the United States
for the District of Oregon**

FILED

JAN - 2 1943



No. 10316

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Circuit Court of Appeals

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AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ERSKINE WOOD,

Yeon Building, Portland, Oregon,
for Appellant, American-Hawaiian Steam-
ship Company, Respondent and claimant
of the "Pennsylvanian", and Appellee on
the cross-appeal.

DEY, HAMPSON and NELSON,

CLARENCE J. YOUNG and

RICHARD B. MAXWELL,

Pacific Building, Portland, Oregon,
for Appellee, Western Transportation
Company, Libellant, and Appellant on
cross-appeal.

In the District Court of the United States
for the District of Oregon
March Term, 1941.

Be It Remembered, That on the 1st day of May, 1941, there was duly filed in the District Court of the United States for the District of Oregon, a Libel in rem and in personam, in words and figures as follows, to wit: [2*]

In the District Court of the United States
for the District of Oregon
In Admiralty

No. 727

WESTERN TRANSPORTATION CO., a
corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a corporation, and the SS. "PENN-
SYLVANIAN", her engines, boilers, etc.,
Respondents.

LIBEL IN REM AND IN PERSONAM

To: The Honorable James A. Fee and the Honorable Claude McColloch, Judges of the District Court of the United States for the District of Oregon,

*Page numbering appearing at foot of page of original certified Transcript of Record.

IN ADMIRALTY SITTING

The libel of Western Transportation Co., in its own behalf as owner of the Str. "Barry K"; and Barges Nos. 22 and 24, as bailee of the cargo laden thereon, and in behalf of its underwriters, against American-Hawaiian Steamship Company in personam and in rem against the SS "Pennsylvanian", her engines, boilers, tackle, apparel, furniture and equipment, in a cause of tort, civil and maritime, respectfully shows as follows:

Article I.

At all times hereinafter mentioned libelant was and now is a corporation duly organized and existing under and by virtue of laws of the state of Oregon, and owner and operator of the sternwheel steam river tug "Barry K", and of two light draft barges bearing numbers 22 and 24 respectively. [3]

Article II.

At all times hereinafter mentioned, American-Hawaiian Steamship Company was and now is a corporation organized and existing under and by virtue of laws of the state of New Jersey, and authorized to do business and doing business in the state of Oregon, and having an office for the transaction of such business at Portland, Oregon, said American-Hawaiian Steamship Company being the owner and operator of the SS "Pennsylvanian", an ocean going steamer.

Article III.

Said SS "Pennsylvanian" is now in the port of

Astoria, Oregon, and within the jurisdiction of the United States District Court for the District of Oregon.

Article IV.

Shortly after midnight on February 1, 1941, said "Barry K" was being navigated at about six miles per hour in a southerly direction upstream on the Willamette River, a part of the navigable waters of the United States, enroute from Camas, Washington, to Portland, Oregon. Said "Barry K" was then with tow of said Barges Nos. 22 and 24, each loaded with paper, Barge No. 22 being made up on the port bow of the "Barry K", and Barge No. 24 being laid out on the port side thereof. The night was dark but clear and an easterly breeze was blowing.

Article V.

At said time the "Barry K" was equipped with proper and lawful lights for navigation at night upon the river and said lights were then burning brightly. She was also equipped with a proper and lawful whistle. At all times up to the collision hereinafter mentioned, a competent pilot was on the lookout and at the wheel of the "Barry K" and he, as well as the rest of the crew who were variously employed in their respective duties, were faithfully attending thereto. At all of said times the "Barry K" was properly [4] and lawfully proceeding on her course upstream.

Article VI.

At said time and during all years preceding, while river boats had been operating upon said river, it was unsafe and impracticable for river tugs such as the "Barry K", particularly with barges in tow, to proceed upstream at said place on the west side of the river. Said "Barry K" and tow was then proceeding up the east side of said river in accord with safety requirements and with the uniform practice of river boats with barges, which practice had existed for more than forty years prior thereto. Said practice and the basis therefor was well known to all Willamette River pilots.

Article VII.

At approximately 12:40 o'clock A. M., and while the "Barry K" was passing Post Office Bar Light No. 3, the green light and two white mast lights of a vessel proceeding downstream, which vessel later proved to be the SS "Pennsylvanian", appeared between a mile and a mile and a half ahead. The position and color of said lights indicated that said approaching vessel was proceeding along Post Office Range and was crossing the bow of said "Barry K" from east to west.

Article VIII.

When the two vessels were about a mile apart, the "Barry K" gave two short blasts of her whistle for a starboard passage, which the SS "Pennsylvanian" answered with one blast. Thereafter the

"Barry K" gave four short blasts of her whistle to signify danger or signals misunderstood. There was no response from the SS "Pennsylvanian". During this time the "Barry K" was swinging to port, i. e., turning toward the east, for the purpose of getting into the clear of the main ship channel and reaching shallow water where she and her tows could proceed with safety and out of the path of the approaching steamer. During the same time, although [5] the SS "Pennsylvanian" could with complete safety have passed the "Barry K" to starboard, the SS "Pennsylvanian" nevertheless had changed her course and, in disregard of the "Barry K's" signals, was turning easterly in the same direction the "Barry K" was turning, and was heading directly toward the "Barry K".

Article IX.

The "Barry K" again gave two short blasts of her whistle for a starboard passing which the SS "Pennsylvanian" did not answer. The "Barry K" then gave another danger signal by four short blasts of her whistle, followed by two short blasts for a starboard passing, and stopped her engines. The SS "Pennsylvanian" being in relatively close proximity to the "Barry K" then gave three whistles indicating that her engines were full speed astern. The engines of the "Barry K" were then likewise put full speed astern, and three whistles were blown by her. The SS "Pennsylvanian" from the time she first turned the same direction as the

“Barry K” continued on said course directly toward the “Barry K” and its tows. The “Barry K” brought its tow to a complete stop in an effort to avoid a collision, but the oncoming SS “Pennsylvanian” nevertheless struck Barge No. 22 on its starboard side.

Article X.

Said collision was in no way due to fault on the part of the “Barry K”, its pilot, officers or members of its crew, but was due entirely to fault on the part of the SS “Pennsylvanian” and of those having charge of her navigation in the following particulars among others:

(1) She failed to give proper or any heed to the several whistle signals by the “Barry K” for a starboard passing.

(2) She failed to give proper or any heed to the danger signals given by the “Barry K”.

(3) She crossed the first starboard passing signal given by the “Barry K” with a port passing signal of her own. [6]

(4) Although she saw or ought to have seen the position of the “Barry K” as above described, she failed to take any proper steps to avoid collision.

(5) She failed to change her course to her port so as to avoid collision.

(6) After sighting the “Barry K” she changed

her course to starboard and continued thereon to the moment of collision.

(7) She failed, while yet a safe distance from the "Barry K" to slow down.

(8) She continued at an immoderate and unreasonable speed toward said "Barry K".

(9) Although at all times after the two vessels sighted each other, and up to the moment of the actual collision, there was adequate space in ship's channel to the west of the "Barry K" for the passage of the SS "Pennsylvanian" and no available space to the east of the "Barry K" for such passage, said SS "Pennsylvanian" nevertheless failed to take advantage of said circumstance.

(10) She took no timely steps to avoid collision.

(11) That said SS "Pennsylvanian" was negligent in other and further particulars of which libelant is not at present advised, and when so advised libelant will ask leave to offer evidence thereof, and amend its libel to conform to said evidence.

(12) No competent person was immediately available on the forecastle head of the SS "Pennsylvanian" to drop the anchors of said vessel in response to command from her bridge.

(13) No timely or any order was given by officers of the SS "Pennsylvanian" to drop anchor for the purpose of slowing or stopping said vessel and thus avoiding collision.

Article XI.

That by reason of said collision Western Transportation Co., a corporation, has suffered damage as near as can be presently estimated in the injury of said Barge No. 22 in an amount upwards [7] of \$12,200.00; in the injury to said "Barry K" in an amount upwards of \$425.00; in the loss to cargo on said Barges Nos. 22 and 24 in the sum upwards of \$11,400.00 and in demurrage respecting said Barge No. 22 and said "Barry K" in the aggregate sum upwards of \$1700.00.

Article XII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libelant prays that it may have a decree against respondent American-Hawaiian Steamship Company for the amount of its damages and costs and for such other relief as to the Court may seem just and in accordance with the admiralty practice; and libelant further prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said SS "Pennsylvanian," her engines, boilers, tackle, apparel, furniture and equipment, and that all persons claiming any right, title or interest therein may be cited to appear and answer upon oath all and singular the matters aforesaid, and that said vessel, her engines, boilers, tackle, ap-

parel, furniture and equipment may be condemned and sold to pay the amount due to libelant, with interest and costs, and that the Court will grant to libelant such other or further relief as in law and justice it may be entitled to receive.

DEY, HAMPSON & NELSON,
CLARENCE J. YOUNG,
RICHARD B. MAXWELL,
Proctors for Libelant.

State of Oregon,
County of Multnomah—ss.

I, R. L. West, being first duly sworn depose and say that I am the Secretary-Treasurer of Libeland Corp. in the abovde entitled.....; and that the foregoing libel in rem and in personam is true as I verily brlieve.

R. L. WEST

Subscribed and sworn to before me this 1st day of May, 1941.

[Seal] CLARENCE J. YOUNG,
Notary Public for the State of Oregon.

My commission expires Mar. 18, 1941.

[Endorsed]: Filed May 1, 1941. [8]

And afterwards, to wit, on the 1st day of May, 1941, there was duly filed in said Court, Libelant's Stipulation for Costs, in words and figures as follows, to wit: [9]

[Title of District Court and Cause.]

LIBELANT'S STIPULATION FOR COSTS

Whereas, a libel was filed in this Court on or about the 1st day of May, 1941, by Western Transportation Co., a corporation in personam against the American-Hawaiian Steamship Company, a corporation, and in rem against the SS "Pennsylvanian", her engines, boilers, tackle, apparel, furniture and equipment, for the reasons and causes in said libel mentioned, and praying for judgment and decree against libelant American-Hawaiian Steamship Company, a corporation, and that process may issue against the said SS "Pennsylvanian" her engines, boilers, tackle, apparel, furniture and equipment, and said respondents be required to appear and answer said libel; and the said libelant and Fidelity & Deposit Company of Maryland, Baltimore, Maryland, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant or its surety, execution may issue against their goods, chattels and lands for the sum of Two Hundred Dollars (\$200.00);

Now, Therefore, it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be and are bound in the sum of Two Hundred Dollars (\$200.00) conditioned that the libelant above named shall pay all such costs as shall be awarded against libelant

and/or the stipulator [10] undersigned, by this Court, or in case of appeal, by the Appellate Court.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
BALTIMORE, MARYLAND,
By CLARENCE D. PORTER,
State Resident Agent.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
BALTIMORE, MARYLAND,
By CLARENCE D. PORTER,

[Seal] Attorney-in-Fact.

[Endorsed]: Filed: May 1, 1941. [11]

And afterwards, to wit, on the 1st day of May, 1941, there was issued out of said Court, a Monition in personam, in words and figures, as follows, to wit: [12]

[Title of District Court and Cause.]

MONITION

The President of the United States of America
to the Marshal of the District of Oregon, or his
Deputy—Greeting:

Whereas, a libel was filed in the District Court of the United States for the District of Oregon, on the 1st day of May, 1941, by Western Transportation Co., a corporation, libelant, against American-Hawaiian Steamship Company, a cor-

poration, in a certain cause of tort civil and maritime, as more fully appears by the said Libel on file in the office of the Clerk of the said Court.

Now, therefore, you are hereby strictly enjoined and commanded that you cite said American-Hawaiian Steamship Company, a corporation, to appear before the Judges of the District Court of the United States for the District of Oregon, at the City of Portland in said District, on Monday the 2nd day of June, 1941, if it be a court day, or else on the court day next following, at ten o'clock in the forenoon of said day, then and there to answer unto said libelant, and further to do and receive in this behalf as to justice shall appertain. And that you duly certify to the Court aforesaid what you shall do in the premises together with these presents.

Witness the Honorable James Alger Fee and the Honorable Claude McColloch, Judges of said Court, and the seal thereof, hereto affixed, at Portland, in said District, on the 1st day of May, A. D. 41.

[Seal] G. H. MARSH,
Clerk.

By F. L. BUCK,
Chief Deputy Clerk. [13]

United States of America,
District of Oregon—ss.

I hereby certify and return, That on the 1st day of May 1941 I received the within Monition & Libel, And that I served the same on the 2nd day of May

1941 at 11:10 A. M. on F. N. Mills, Atty. in Fact for said American-Hawaiian Steamship Co., etc., at his office in the Railway Exchange Bldg. 320 SW, Stark St., Portland, Ore., by delivering a copy thereof together with a copy of the Libel in the within entitled cause to the therein named F. N. Mills, Atty. in fact for said Co. personally. Dated at Portland, Oregon, this 2nd day of May, 1941.

J. T. SUMMERVILLE,

United States Marshal.

By W. H. RICKARD,

Deputy U. S. Marshal.

[Endorsed]: Filed May 2, 1941.

And Afterwards, to wit, on the 1st day of May, 1941, there was issued out of said Court, a Warrant of Arrest and Monition in rem, in words and figures, as follows, to wit: [14]

District Court of the United States

For the District of Oregon

WARRANT OF ARREST AND MONITION

The President of the United States of America
to the Marshal of the District of Oregon, or
his Deputy, Greeting:

You Are Hereby Strictly Enjoined and Com-
manded that you arrest the vessel called the SS
"Pennsylvanian" whereof now is, or lately was,
master, her tackle, apparel, and furniture, engines,

boilers, and equipment if she shall be found within your district; and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the Court, or the same shall be discharged in due course of law; and that you cite at the premises all persons in general who have, or pretend to have, any right, title, or interest therein, to appear before the Judge of the District Court of the United States, for the District of Oregon, at the City of Portland, on the 2nd day of June A. D. 41, if it be a court day, or else on the court day next following, at ten o'clock in the forenoon of such day, then and there to answer unto Western Transportation Co., a corporation, in the cause of tort, civil and maritime, and further to do and to receive in this behalf as to justice shall appertain; and that you duly certify the Court aforesaid what you shall do in the premises, together with these presents.

Witness the Honorable James Alger Fee and the Honorable Claude McColloch, Judges of said Court, and the seal thereof hereto affixed at Portland in said District on the 1st day of May, A. D. 41.

[Seal]

G. H. MARSH,

Clerk.

By F. L. BUCK,

Chief Deputy Clerk. [15]

And Afterwards, to wit, on the 1st day of May, 1941, there was duly Filed in said Court, a Claim of Owner of the "Pennsylvanian" in words and figures as follows, to wit: [16]

[Title of District Court and Cause.]

CLAIM OF OWNER

American-Hawaiian Steamship Company, owner of the above named SS. Pennsylvanian, appears before this Court, by F. N. Mills, its Agent, who claims the said ship and prays to defend this suit accordingly.

ERSKINE WOOD

ERSKINE B. WOOD

Proctors for Claimant.

District of Oregon—ss.

F. N. Mills, being duly sworn, says that American-Hawaiian Steamship Company is the true owner of the said ship Pennsylvanian. and that no other person is the owner thereof, and that deponent is agent of the owner and authorized to put in this claim, and deponent further says that at the time of the commencement of this suit said ship Pennsylvanian was in the possession of said owner.

F. N. MILLS

Subscribed and sworn to before me this 1st day of May, 1941.

[Seal]

M. MUIR

Notary Public for Oregon.

My commission expires July 12, 1943.

[Endorsed]: Filed May, 1941. [17]

And Afterwards, to wit, on the 1st day of May, 1941, there was duly Filed in said Court, Claimant's Stipulation to Abide by and Pay Decree, in words and figures as follows, to wit: [18]

[Title of District Court and Cause.]

STIPULATION

Whereas a libel was filed in this Court on May 1, 1941, by Western Transportation Co. against the SS. Pennsylvanian, etc., for the reasons and causes in said libel mentioned, and whereas a claim to said steamship has been filed by American-Hawaiian Steamship Company, and the said claimant and Fireman's Fund Indemnity Company, a California corporation, its surety, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, execution may issue against their goods, chattels and lands for the sum of Thirty Thousand Dollars (\$30,000.):

Now, Therefore, It Is Hereby Stipulated and Agreed, for the benefit of whom it may concern, that the stipulators undersigned are bound in the sum of Thirty Thousand Dollars (\$30,000.00), conditioned that the claimant above named shall abide by and pay the money, including costs and disbursements, awarded by the final decree rendered in this cause by this Court, or in case of appeal by the Appellate Court.

Dated May 1, 1941.

AMERICAN-HAWAIIAN
STEAMSHIP COMPANY

By F. N. MILLS

District Manager
FIREMAN'S FUND
INDEMNITY COMPANY

[Seal] By E. A. VALENTINE
Attorney-in-Fact

Approved as to form and amount.

CLARENCE J. YOUNG
of Proctors for Libelant.

[Endorsed]: Filed May 1, 1941. [19]

And Afterwards, to wit, on the 10th day of June, 1941, there was duly Filed in said Court, an Answer and Cross Libel of Claimant and Respondent, in words and figures as follows, to wit: [20]

In the District Court of the United States
For the District of Oregon

No. Civ. 727

WESTERN TRANSPORTATION CO., a corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, and the SS. "PENNSYLVANIAN", her engines, boilers, etc.,
Respondents.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Claimant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Cross-Libelant,

vs.

WESTERN TRANSPORTATION CO., a corporation, and the Steamboat "BARRY K", Etc., and Barges 22 and 24,

Cross Respondents.

ANSWER AND CROSS-LIBEL OF AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
CLAIMANT, AND CROSS-LIBELANT

To the Honorable James Alger Fee and the Honorable Claude McColloch, Judges of the above entitled Court:

The answer of American-Hawaiian Steamship Company, as claimant of the SS. Pennsylvanian, and also as respondent in personam, to the libel of Western Transportation Company, says:

Article I.

The claimant and respondent admits the allegations of Article I.

Article II.

The claimant and respondent admits the allegations of Article II. [21]

Article III.

The claimant and respondent admits that, at the time the libel was filed and process issued, the Pennsylvanian was at Astoria in the jurisdiction of this Court.

Article IV.

The claimant and respondent admits that on February 1, 1941, the Barry K and Barges 22 and 24 were being navigated in a southerly direction up stream en route from Camas to Portland, and that the barges were loaded with paper, and that the night was dark, but denies that it was clear, and

alleges that it was overcast, but with visibility good; denies knowledge of the speed of the Barry K, and denies that the Barry K and her tow were made up, as alleged, with the Barge 22 on the port bow, and alleges that Barge 22 was lashed ahead of the Barry K's bow, resting on her stem, and that Barge 24 was lashed alongside on the port side. Denies that any easterly breeze was blowing, except so slight as to be negligible, and alleges that the night was calm. (Throughout this answer claimant and respondent refers to the Barry K's tow as "barges", since libelant has so denominated them, but reserves the right to assert that they are "scows" if the evidence so justifies, and their character becomes material.)

Article V.

Denies that the Barry K was equipped with proper or lawful lights for navigation, and in this respect alleges that the white light on her stem was either extinguished or obscured, and that the barges were not lighted as required by the regulations. Denies knowledge or information sufficient to form a belief whether she was equipped with a proper or lawful whistle, or whether her pilot was competent or whether he was acting both as lookout and helmsman, or whether the crew were performing their duties. Denies specifically that the Barry K at all or any times was properly or lawfully [22] proceeding on her course up stream, and alleges that she was proceeding up stream on her own left-

hand side of a narrow channel, as understood in law, in violation of Article 25 of the Inland Rules, when it was both practicable and safe for her to have kept to the right-hand side as required.

Article VI.

Claimant and respondent denies the allegations of Article VI and each of them, except it admits that the Barry K and tow were proceeding up the east side of the river, and alleges that such procedure was in violation of law.

Article VII.

Claimant and respondent denies knowledge or information sufficient to form a belief of the allegations of Article VII, but admits that about the time alleged the Pennsylvanian was coming down the Willamette River toward Post Office Bar, having passed under the St. Johns bridge at 12:39 A. M.

Article VIII.

Denies the allegations of Article VIII and each of them, except as they may be hereinafter admitted in the affirmative allegations of the cross-libel following this answer.

Article IX.

Denies the allegations of Article IX and each of them, except as they may be hereinafter admitted in the affirmative allegations of the cross-libel following this answer. [23]

Article X.

Claimant and respondent denies the allegations of Article X and each of them; and alleges that the collision was entirely due to the fault of the Barry K and its navigating officers, as hereinafter alleged in the cross-libel following this answer.

Article XI.

Denies knowledge or information sufficient to form a belief of the allegations of Article XI, and calls for proof of the same.

Article XII.

Claimant and respondent denies that all or singular the premises are true, but admits the jurisdiction of the Court.

CROSS-LIBEL

This cross-libel of American-Hawaiian Steamship Company, a corporation, against Western Transportation Co. and the river steamboat Barry K, her engines, boilers, tackle, apparel and furniture, and Barges 22 and 24, in a cause of collision, civil and maritime, alleges as follows: (Throughout this cross-libel cross-libelant refers to the Barry K's tow as "barges", since libelant has so denominated them, but reserves the right to assert that they are "scows" if the evidence so justifies, and that character becomes material.)

Article I.

The cross-libelant is a corporation organized and

existing under the laws of the State of New Jersey and is, and at all times herein mentioned was, the owner of the American Steamship *Pennsylvanian*, against which the original libel in this cause was filed. [24]

Article II.

The Western Transportation Co. is a corporation organized and existing under the laws of the State of Oregon, and is, and at all times hereinafter mentioned was, the owner of the river steamboat *Barry K* and of the said Barges 22 and 24.

Article III.

The said steamboat *Barry K* and the said Barges are, or at the time process herein is issued will be, in the District of Oregon, and within the jurisdiction of this Court.

Article IV.

At about 12:55 A. M. on February 1, 1941, the said *Barry K* and her barges were in collision with the said *Pennsylvanian* in the Willamette River near what is known as Post Office Bar, and as a result of said collision the *Pennsylvanian* suffered the damage hereinafter alleged.

Article V.

The Willamette River at the place where the collision occurred, is a narrow channel, as that term is understood in the laws and statutes regulating navigation, and particularly Article 25 of the Inland Rules.

Article VI.

The Bureau of Marine Inspection and Navigation of the U. S. Department of Commerce has, previously to this collision, ruled that the river at this place is a narrow channel, as understood in said Article 25, and that a pilot of a tug and tow was negligent in attempting to come up stream at this place on the left-hand side, and all pilots were and are bound to take cognizance of that ruling. [25]

Article VII.

The facts and circumstances of the collision between the *Pennsylvanian* and the *Barry K* and her barges were as follows:

1. The *Pennsylvanian*, under the command of her master, Captain Vaux, and with Pilot John Norberg, Willamette and Columbia River pilot, acting as pilot, left Pier A, Terminal No. 1, Portland, at 12:03 A. M., February 1, 1941, bound for Astoria. The weather was overcast, visibility good, calm and smooth, with a slight current in the river, to-wit, about half a knot, and at all times hereinafter narrated the said master, pilot, and the third mate were on the bridge. A helmsman was at the wheel, a lookout was stationed forward on the forecastle head, and the pilot was conning the ship. The vessel proceeded down river, passed through the railroad bridge at slow speed, and, passing under St. Johns bridge, put her engines at half speed at 12:39 A. M.

2. The *Pennsylvanian* proceeded down stream on the usual course of steamers on the Post Office Bar range, and shortly after leaving it, sighted the lights of a towboat approximately a mile or more down stream, which towboat later proved to be the *Barry K* with two barges in tow.

3. Shortly after the *Pennsylvanian* sighted the *Barry K*, the *Barry K* blew one blast of her whistle, indicating a passage port to port, in accordance with the regular rules of the road, and the *Pennsylvanian* answered this with one blast, and continued down stream on her own right-hand side of the channel. As the vessels continued to approach, the *Barry K* showed her green light and shut out the red, whereupon the *Pennsylvanian* slowed and stopped her engines. [26]

4. Shortly thereafter the *Barry K* sounded several short and rapid blasts understood by those on the *Pennsylvanian* to be a danger signal, and the *Pennsylvanian's* engines were put full astern, and the wheel hard right, and the *Pennsylvanian* sounded three short and rapid blasts to indicate that her own engines were going full astern, and soon after that, to-wit, at about 12:55 A. M., the *Pennsylvanian* collided with one of the *Barry K's* barges, namely, Barge 22, on the latter's starboard side.

5. At all times herein, the *Pennsylvanian* was keeping well to that side of the fairway or midchannel which lay on her own starboard

side, in accordance with Article 25 of the Inland Rules, and the Barry K, in violation of said article, failed to keep to her own right-hand side, and the collision occurred well toward the east side of the river in the Pennsylvania's water. The river here is at least 1100 feet wide, and the 30-foot channel is at least 800 feet wide. It was a calm night, with no appreciable wind or current, and it was entirely safe and practicable for the Barry K and her tow to proceed up stream on her own right-hand side, as Article 25 requires. The collision occurred entirely through the fault of the Barry K.

Article VIII.

The Barry K and her tows were being operated at the time of said collision by the respondent Western Transportation Co., and the said Barry K and her tows and said respondent were negligent in the particulars hereinafter alleged, one or all of which caused or contributed to said collision and to the damage sustained by the [27] Pennsylvanian:

1. The Barry K and her tows failed to keep to that side of the fairway or midchannel which lay on their own starboard side, when it was entirely safe and practicable for them to have done so, all in violation of said Article 25.

2. The Barry K and her tows persisted in said violation of Article 25 after it became clearly evident that the Pennsylvanian, in obedience to said Article 25, was keeping to

her own right-hand side, and was thus occupying the side of the river into which the Barry K and her tows were proceeding. The Barry K and her tows continued to proceed at full speed ahead without slowing or stopping her engines, and did not reverse them or take any effective steps to avoid the collision until too late to do so.

3. The Barry K was navigated by her pilot alone, and her master was asleep, and was not called to the pilot house until too late to take any steps to avoid the collision.

4. The front range light of the Barry K was either obscured or not burning.

5. The barges were not lighted in accordance with the regulations of the Bureau of Marine Inspection and Navigation in this, namely, the only lights on them, on information and belief based upon the testimony of the Barry K's pilot given at the investigation before the said Bureau of Marine Inspection and Navigation, were a kerosene lantern on the forward starboard corner of Barge 22, another on the forward port corner of Barge 24, and one on the after port corner of said Barge 24, but none of these lanterns shone all around the horizon, since they were partly obscured by the deckhouses of the barges, and none of them had the visibility [28] required by the regulations.

6. The Barry K, on information and belief based upon the testimony of her own pilot given

before the said Bureau, after she had received one blast from the *Pennsylvanian*, twice blew two blasts, and proceeded on the wrong side of the channel, and did not slow or stop her engines until after the second of the said two blasts, and did not reverse until after the *Pennsylvanian* herself reversed and had given the signal therefor.

The *Barry K* was negligent in other particulars which, if the evidence justifies at the trial, this cross-libelant will ask leave to amend its cross-libel and allege, so as to conform to such evidence.

Article IX.

In said collision, the *Pennsylvanian* suffered damages necessitating drydocking and repairs and causing the ship to be detained and to lose time while said repairs were made, and as a result thereof, this cross-libelant, *American-Hawaiian Steamship Company*, has been, and is, damaged in the sum of \$35,000.00, as nearly as can now be estimated, with interest, all because of the negligence of the *Barry K* and tow, and their owner, as hereinbefore alleged.

Article X.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this Court.

Wherefore, *American-Hawaiian Steamship Co.*, as claimant of the *Pennsylvanian* and as respondent to the libel of *Western Transportation Co.*, prays

that said libel be dismissed; and, [29] as cross-libelant, prays that process in due form of law may issue against the said Barry K, etc., and her said two barges, and that all persons claiming any right, title or interest in them be cited to appear and answer on oath all and singular the matters aforesaid, and that said steamboat and barges be condemned and sold to pay the demands and claims aforesaid, with interest and costs; and that process may issue against the Western Transportation Co. in personam, citing it to appear and answer on oath the matters and things alleged in this cross-libel; and that this cross libelant may have and recover from said Western Transportation Co. the amount of its said damages, with interest and costs; and that proceedings on the libel be stayed until adequate security, in the form of an admiralty stipulation in the sum of \$40,000.00, be filed by the libelant to abide by and pay any decree that may be entered on the cross-libel; and this cross-libelant prays for such other, further and different relief as to this Honorable Court may seem just and in accordance with the Admiralty practice.

ERSKINE WOOD

ERSKINE B. WOOD

Proctors for American - Hawaiian Steamship Company,
Claimant of the Pennsylvanian, and Respondent to the
original Libel, and Cross-Libelant.

District of Oregon—ss.

I, F. N. Mills, first being duly sworn, say that I am District Manager of American-Hawaiian Steamship Company, respondent, claimant, and cross-libelant in the above entitled cause; that I am familiar with the contents of the within answer and cross-libel; and state, that, on my information and belief, the allegations therein contained are true.

F. N. MILLS

Subscribed and sworn to before me this 9th day of June, 1941.

[Seal]

JOHN P. LIPSCOMB, JR.

Notary Public for Oregon

My commission expires Oct. 13, 1944. [30]

Service of the within Answer and Cross-Libel, by certified copy, at Portland, Oregon, this 10th day of June, 1941, is hereby admitted.

CLARENCE J. YOUNG,

Of Prectors for Libelant.

[Endorsed]: Filed June 10, 1941. [31]

And Afterwards, to wit, on the 12th day of June, 1941, there was duly Filed in said Court, a Notice by cross libelant of application for an order for respondent in cross-libel to give bond to abide by and pay decree, in words and figures as follows, to it: [32]

In the District Court of the United States
for the District of Oregon

No. Civ. 727

The “PENNSYLVANIAN” and the
“BARRY K”.

NOTICE

To Mr. Clarence J. Young, Proctor for Libelant.

Dear Sir:

At the coming in of Court on next Thursday morning, June 12th, or as soon thereafter as proctors can be heard, we shall apply for an order, copy of which is attached.

Very truly yours,

ERSKINE WOOD

ERSKINE B. WOOD

Proctors for American-
Hawaiian Steamship Com-
pany.

[Endorsed]: Filed June 12, 1941. [33]

And Afterwards, to wit, on Thursday, the 12th day of June, 1941, the same being the 87th Judicial day of the Regular March, 1941, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [34]

[Title of District Court and Cause.]

ORDER RE BOND

On application of the cross-libelant, American-Hawaiian Steamship Company, appearing by its proctor, Erskine Wood,

It Is Ordered that the libelant, Western Transportation Co., file in this court within ten days an admiralty stipulation in the sum of \$35,000 to abide by and pay the decree that may be entered on the cross-libel, and that pending the filing of such stipulation, all proceedings on the libel be stayed.

Dated this 12th day of June, 1941.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed June 12, 1941. [35]

And Afterwards, to wit, on the 12th day of June, 1941, there was duly Filed in said Court, stipulation by claimant in Cross-Libel to abide by and pay decree, in words and figures as follows, to wit: [36]

In the District Court of the United States
for the District of Oregon
No. Civ. 727

WESTERN TRANSPORTATION CO., a corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, and the SS. "PENNSYLVANIAN", her engines, boilers, etc.,

Respondents.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Claimant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Cross-Libelant,

vs.

WESTERN TRANSPORTATION CO., a corporation, and the Steamboat "BARRY K", Etc., and Barges 22 and 24,

Cross Respondents.

STIPULATION

Whereas, on June 10th, said American-Hawaiian Steamship Company, claimant and respondent, as cross-libelant, filed a cross libel against the Str.

“Barry K”, etc., for the reasons and causes in said cross libel mentioned; and whereas a claim to said steamboat has been filed by Western Transportation Company, claimant, libelant and cross respondent, and the said claimant, Western Transportation Company and American Bonding Company, its surety, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, Western Transportation Company, execution may issue against their goods, chattels and lands for the sum of Thirty-five Thousand Dollars (\$35,000.00).

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern that the stipulators undersigned are bound in the sum of Thirty-five Thousand Dollars (\$35,000.00) conditioned that the claimant, Western Transportation Company shall abide by and pay the money, including costs and disbursements awarded in the final decree rendered in this cause by this Court, or in case of appeal by the Appellate Court.

Dated at Portland, Oregon, the 18th day of June, 1941.

[Seal]

WESTERN TRANSPORTA-
TION COMPANY

By R. L. WEST

Secretary-Treas.

[Seal]

AMERICAN BONDING COM-
PANY

By JACK GODFREY

Attorney in Fact

[Endorsed]: Filed June 19, 1941. [37]

And Afterwards, to wit, on the 12th day of July, 1941, there was duly Filed in said Court, an Answer to Cross-Libel, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

ANSWER TO CROSS-LIBEL

The answer of Western Transportation Company, a corporation, as claimant of the Steamboat "Barry K," her engines, etc., and Barges 22 and 24, and as respondent in personam to the cross-libel of Western Transportation Company, says:

Article I.

Admits the allegations of Article I.

Article II.

Admits the allegations of Article II.

Article III.

Admits the allegations to Article III. [39]

Article IV.

Denies the allegations of Article IV, and each of them, except claimant and respondent to the cross-libel admits that at about 12:55 A.M. on February 1, 1941, the said Barry K and her barges were in collision with the said Pennsylvanian in the Willamette River, near what is known as Postoffice Bar.

Article V.

Admits the allegations of Article V.

Article VI.

Denies the allegations of Article VI and each of them.

Article VII.

Claimant and respondent to the cross-libel denies the allegations of Article VII, and each of them, except as the same conform to the allegations of Articles IV to X, both inclusive, of this claimant and respondent's original libel on file herein against said cross libelant and said SS Pennsylvanian, her engines, etc., which said articles are by this reference made a part hereof.

Article VIII.

Denies the allegations of Article VIII, and each of them.

Article IX.

Denies the allegations of Article IX, and each of them, except claimant and respondent to the cross-libel admits that the Pennsylvanian suffered some damages in said collision, necessitating dry-docking and repairs and causing said ship to be detained and to lose some time while said repairs were made.

Article X.

Denies the allegations of Article X, and each of them, except respondent and claimant to the cross-libel admits that the matters referred to in said cross-libel are *with* the admiralty and maritime jurisdiction of this Court. [40]

Western Transportation Company, a corporation,

as claimant to the SS Barry K, her engines, etc., and Barges 22 and 24, and as respondent to the cross-libel of American-Hawaiian Steamship Company for an affirmative defense to said cross-libel says:

Article I.

Refers to and by this reference re-alleges the allegations of each and every article of its original libel herein, except Article XI thereof, against cross-libelant American-Hawaiian Steamship Company, a corporation, and the SS Pennsylvanian, her engines, etc., and makes the same a part hereof.

Article II.

Negligence of the said American-Hawaiian Steamship Company as hereinbefore set out was the sole and proximate cause of said collision and the damages resulting therefrom.

Wherefore, having fully answered the cross-libel of American-Hawaiian Steamship Company, respondent, claimant and cross-libelant, Western Transportation Company, libelant and claimant and respondent to the cross-libel prays that said cross-libel be dismissed and for such other and further relief as is prayed for in its original libel herein.

DEY, HAMPSON & NELSON

CLARENCE J. YOUNG

R. B. MAXWELL

Proctors for Western Transportation Company, libelant, claimant and respondent to cross-libel.

United States of America,
District of Oregon—ss.

I, Robert West, first being duly sworn, say that I am Secretary-Treasurer of Western Transportation Company, libelant, claimant and respondent to cross-libel in the above entitled cause; that I am familiar with the contents of the within answer to cross-libel; and state, that, on my information and belief, the allegations therein contained are true.

ROBERT WEST

Subscribed and sworn to before me this 12th day of July, 1941.

[Seal]

CLARENCE J. YOUNG

Notary Public for Oregon.

My Commission Expires Mar. 18, 1944. [41]

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Answer to Cross-Libel by copy, as prescribed is hereby admitted at Portland, Oregon, this 12 day of July, 1941.

ERSKINE WOOD

Of Proctors for Respondents,
Claimant and Cross Libel-
ant.

[Endorsed]: Filed July 12, 1941. [42]

And Afterwards, to wit, on the 10th day of October, 1941, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [43]

In the District Court of the United States
for the District of Oregon
Civ. No. 727

WESTERN TRANSPORTATION CO.,
a corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a corporation, and THE SS. "PENN-
SYLVANIAN", her engines, boiler, etc.
Respondents.

MEMORANDUM OF DECISION

In the view that I take of the case, decision of a number of questions presented at the trial becomes unnecessary. My view is that both vessels were negligent in failing to stop their engines at the time the "*Bary K*" blew the first danger signal. The pilot of the "*Pennsylvanian*" claimed in his corrected testimony that he ordered full astern on hearing the first danger signal, but the circumstances of the case persuade me that he did not take this action at the time stated. Had either or both pilots stopped engines when it became apparent that a dangerous situation had arisen, it is unlikely that the vessels would have come together. This view makes the case one for divided damages.

Dated October 10, 1941.

CLAUDE McCOLLOCH
Judge

[Endorsed]: Filed October 10, 1941. [44]

And Afterwards, to wit, on the 2nd day of December, 1941, there was duly lodged in the Clerk's Office for the Court by Libelant, proposed Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [45]

In the District Court of the United States
for the District of Oregon

No. Civ. 727

WESTERN TRANSPORTATION CO.,
a corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a corporation, and the S.S. "PENN-
SYLVANIAN", her engines, boilers, etc.,
Respondents.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a corporation,

Claimant.

AMERICAN-HAWAIIAN STEAMSHIP COM-
PANY, a corporation,

Cross Libelant,

vs.

WESTERN TRANSPORTATION CO., a cor-
poration, and the Steamboat "BARRY K",
etc., and Barges 22 and 24,

Cross Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial commencing on July 15, 1941, and continuing from day to day, Sundays excepted, to and including the 24th day of July, 1941. Libelant and cross-respondent, Western Transportation Company appeared by Clarence J. Young and Richard B. Maxwell, its proctors, of the firm of Dey, Hampson & Nelson, and claimant and cross-libelant, American-Hawaiian Steamship Company appeared by Erskine Wood and Erskine B. Wood, its proctors. On the basis of the pleadings and the evidence introduced during the course of the trial I find the facts to be as follows: [46]

FINDINGS OF FACT

I.

Libelant and cross-respondent, Western Transportation Company, is now and had been since prior to February 1, 1941, a corporation duly organized and existing under and by virtue of laws of the State of Oregon. Said company was on February 1, 1941, the owner and operator of the stern wheel steam river tug "Barry K" and of two light draft lighters (commonly called throughout the case barges) bearing numbers 22 and 24 respectively.

II.

American-Hawaiian Steamship Company, claimant and cross-libelant, now is and was on and prior to February 1, 1941, a corporation organized and

existing under and by virtue of laws of the State of New Jersey, and authorized to do and doing business in the State of Oregon, and having an office for the transaction of such business at Portland, Oregon. Said company now is and was on February 1, 1941, the owner and operator of the S.S. "Pennsylvanian", an ocean-going steamer.

III.

The S.S. "Pennsylvanian" and her owners are liable for the total damage to the cargo of the tows of the "Barry K".

IV.

At 1:56 A.M. on the morning of February 1, 1941, a collision occurred in the Willamette River at a point known as Postoffice Bar between the S. S. "Pennsylvanian" and the steam river tug boat "Barry K." Said river is a navigable stream and a part of the navigable waters of the United States. Said river at said place is a narrow channel within the meaning of the laws and statutes regulating navigation. [47]

Just prior to said collision the said "Barry K" was being navigated at a speed of about six miles per hour in a southerly direction upstream on the Willamette River. Said "Barry K" was then with tow of said lighters No. 22 and 24 each loaded with paper, lighter 22 being made up on the port bow of the "Barry K" and lighter No. 23 being laid out on the port side thereof. Said "Barry K" was enroute from Camas, Washington, to Portland, Oregon.

VI.

The night was dark but clear and an easterly breeze of about fourteen miles an hour was blowing. The "Barry K" and her tows were equipped with proper and lawful lights for navigation at night upon said river, which lights were burning brightly; its forward range light, however, was not lighted because the lighter on "Barry K's" bow obstructed the view of such light and would have blinded the pilot by reflecting such light. She was equipped with a proper and lawful whistle capable of being heard at a distance in excess of two miles under the conditions then existing. A competent pilot, and licensed master, Captain Reed, was maintaining a lookout at the wheel of the "Barry K". He and other members of the crew on watch were faithfully attending to their duties.

VII.

The Willamette River flows in a general northerly direction from Portland, Oregon, to its junction with the Columbia River, approximately twelve miles north of Portland. At Postoffice Bar there is a sharp bend in the Willamette River, as a result of which the current is deflected so that the natural channel of the river lies along the west bank. The west bank of the river at this point is protected from washing by a dike constructed of piling of uneven height. The east side of the river is shoal water overlying Postoffice Bar. The dredged ship channel, 35 feet in depth, has a width of about 600 feet, and lies toward the westerly portion [48] of

the river. Between the easterly edge of said ships' channel and the east bank of the river, there is approximately 400 feet of water available to river boats but not safe for use by ocean-going vessels. The sand bank on the east side of the river is covered with willows and cottonwoods which afford protection against prevailing easterly winds.

VIII.

The "Barry K" is a stern wheel river boat 190 feet in length with her pilothouse extending 34 feet above the water. The lighters which she had in tow are each approximately 135 feet long by 35 feet beam with their deck houses extending about 20 feet above the water. The "Barry K" drew 2 feet 8 inches and her tows not more than five feet. River boats such as the "Barry K" being of light draft and standing high out of the water are exposed to the wind and are peculiarly subject to slippage when making an outside turn. They are likewise peculiarly affected by currents and wind and by the displacement swell and "kick" water from the propellers of other vessels. River boats with tows are usually required to stop on meeting large ships to prevent breakage of lines and damage, and while so stopped are at the mercy of wind and current and the propulsive force of swells and of "kick" water.

IX.

On said date and for more than forty years prior thereto, it had been and was unsafe and imprac-

licable for river tugs such as the "Barry K" with barges in tow to proceed upstream on the west side of said river at Postoffice Bar. By reason of this fact, it was the universal practice of river boats with barges to proceed up said river at said place upon the easterly side thereof. This custom was known to all Willamette River pilots. The "Barry K" was lawfully proceeding up the easterly side of the river at this point. [49]

X.

The S. S. "Pennsylvanian" under the command of her master, Captain Vaux, and with Pilot John Norberg acting as pilot, left terminal Number 1 in Portland at 12:03 A.M., February 1, 1941, bound for Astoria. At and prior to said collision, her master pilot and third mate were on the bridge, a helmsman was at the wheel, and a lookout was stationed forward on the forecastle head. There was no officer or member of the crew of the S. S. "Pennsylvanian" stationed on the forecastle head in charge of the anchors or capable of dropping the same. The "Pennsylvanian" was proceeding with her engines at full speed ahead, and at a speed of about 8 miles an hour over the ground as she left Postoffice range and sighted the river boat "Barry K". The "Pennsylvanian" was sighted by the pilot of the river boat "Barry K" at approximately the same time and when the vessels were about one mile apart.

XI.

When the two vessels were about 3,000 or 4,000 feet apart, the "Barry K" gave two short blasts of her whistles for a starboard passage. This signal was answered by the "Pennsylvanian" with one blast of its whistle. When the two vessels were about 2500 or 3,000 feet apart, the "Barry K" sounded four short blasts of its whistle as a danger signal. No response by whistle was made by the "Pennsylvanian." When the vessels were between 2,000 and 2,500 feet apart, the "Barry K" again sounded two short blasts of its whistle and again no answer was made by the "Pennsylvanian". When the two vessels were about 2,000 feet apart, the "Barry K" again sounded four blasts of its whistle and again no answer was given by the "Pennsylvanian". When the two vessels were about 1500 feet apart the "Barry K" again sounded two short blasts of her whistle. When the vessels were about 1,000 feet apart, the "Pennsylvanian" sounded three short blasts of her whistle to [50] indicate that her engines were full speed astern. The "Barry K" sounded three blasts of her whistle to indicate her engines were full speed astern when the two vessels were about 500 feet apart.

XII.

Throughout the entire period after the vessels sighted each other, and after the first whistle signals were blown by the "Barry K", the "Barry K" was swinging to its port, that is, toward the east side of the river, for the purpose of getting

into shallow water next to the bank where she and her tows could proceed out of the path of the approaching steamer. During said entire period the "Pennsylvanian" was swinging to her starboard, that is, to the east side of the river, and directly into the course of the "Barry K". The engines of the "Pennsylvanian" were reversed when the vessels were about 1,000 feet and those of the "Barry K" were reversed when the vessels were about 500 feet apart. The vessels collided off Postoffice Bar at a point about 200 feet east of the easterly edge of the main ships' channel. The main ships' channel with a dredged depth of 35 feet and a width of approximately 600 feet was entirely open and free from other river traffic, and was available for use by the S. S. "Pennsylvanian."

XIII.

Those in charge of the navigation of the S. S. "Pennsylvanian" were negligent and at fault in the following particulars:

1. In failing to give proper or any heed to the several whistle signals by the "Barry K" for a starboard passage.
2. In failing to give proper or any heed to the danger signals given by the "Barry K".
3. In crossing the starboard passing signal of the "Barry K" with a port passing signal.
4. In failing to ascertain the position of the "Barry K" and take steps to avoid the collision.

5. In failing to change her course to port but continuing to starboard.

6. In failing to reverse her engines at the first danger signal from the "Barry K".

7. In proceeding at an immoderate rate of speed.

8. In failing to use the open and available main ships' channel.

9. In failing to have available a competent person to drop the anchors.

10. In failing to drop the anchors.

XIV.

Captain John Norberg, pilot of the S. S. "Pennsylvanian" was familiar with the universal practice of river boats to proceed upstream at Post-office Bar on the easterly side of the river.

XV.

The foregoing acts of negligence and fault on the part of those in charge of the S. S. "Pennsylvanian" directly and proximately contributed to said collision.

XVI.

Those in charge of the navigation of the "Barry K" were negligent only in proceeding toward the shallow water on the east side of the river after the "Barry K" blew the first danger signal instead of stopping its engines. This negligence proximately contributed to the collision. Those in charge of the "Barry K" were not negligent in any other respect.

XVII.

The tows of the "Barry K" were loaded with paper which was the property of Crown Willamette Company. Said cargo and its owner were free from fault in connection with said collision.

CONCLUSIONS OF LAW

I.

The "Barry K" was properly handled and navigated prior to and at the time of the collision except for its continuing toward the east bank after blowing its first danger signal, but its action [52] in this regard makes it partially responsible for said collision and its owners are therefore liable to pay one-half of the total damage resulting from said collision.

II.

The "Pennsylvanian" was improperly and negligently handled and navigated prior to and at the time of said collision and her owners are liable for one-half of the total damage resulting from said collision.

At the trial the parties stipulated that they would submit to the court only the question of liability and after a decision on that point they would attempt to agree, if possible, on the amount of damages to be awarded, and, if damages could not be agreed upon, that the matter would be submitted to the court under Rule 43 or in such other manner as the Court might determine.

In accordance with this stipulation, the parties are given until within which to agree

upon the damages resulting from said collision, and if a figure cannot be agreed upon by that time, the proctors for the respective parties shall report said fact to the court and determination will then be made by the court as to how the damages shall be ascertained.

Proctors for libelant and cross-respondent may submit a form of interlocutory decree.

Dated at Portland, Oregon, this ... day of December, 1941.

.....

District Judge

[Endorsed]: Lodged in Clerk's Office, December 2, 1942. [53]

—————

And Afterwards, to wit, on the 3rd day of December, 1941, there was duly Filed in said Court, Exceptions by Respondent to proposed Findings of Fact and Conclusions of Law lodged by Libelant, in words and figures as follows, to wit: [54]

[Title of District Court and Cause.]

EXCEPTIONS OF AMERICAN-HAWAIIAN
STEAMSHIP COMPANY TO THE FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW PROPOSED BY PROCTORS FOR
THE WESTERN TRANSPORTATION CO.
AND THE "BARRY K", ETC.

American-Hawaiian Steamship Company, by its proctors Erskine Wood and Erskine B. Wood, ex-

cepts to the said proposed Findings of Fact and Conclusions of Law on the ground that they go far beyond the Court's written Opinion, and far beyond the Court's own proposed Findings, and attempt to make findings (all in the interest of the "Barry K") on issues upon which the Court has declared it was unnecessary to pass. This exceptor submits that in preparing findings the proctors act merely as clerks for the Judge, and should submit findings only in accordance with the opinion handed [55] down, and not go beyond said opinion. If the Findings proposed by the "Barry K's" proctor are to be considered at all, it really would amount to trying the case all over again and arguing each issue.

The proposed Findings practically follow the pleadings of the "Barry K" and the theory of the "Barry K" upon every issue presented at the trial, and ignore entirely and contrary contentions of the "Pennsylvanian". This exceptor submits that these proposed Findings should be entirely disregarded as an attempt by proctor to foist upon the Court his own notion of the case, contrary to the Court's specific declaration that it was unnecessary to make findings on these issues, since the Court's decision was controlled by other facts which the Court itself has found.

If specific exceptions should be required for each proposed Finding, proctors for the American-Hawaiian Steamship Company will be glad to prepare and submit them, upon request of the Court,

but it is believed that the present general exceptions are sufficient.

ERSKINE WOOD

ERSKINE B. WOOD

[Endorsed]: Filed December 3, 1942. [56]

And Afterwards, to wit, on the 1st day of June, 1942, there was duly Filed in said Court, a stipulation as to damages, in words and figures as follows, to wit: [57]

[Title of District Court and Cause.]

STIPULATION RE DAMAGES

Whereas, the above entitled cause heretofore came on for trial upon the issues respecting liability alone before the Honorable Claude McColloch, one of the judges of the above entitled court, at the conclusion whereof the cause was taken under advisement by the Court, and the Court thereafter rendered its memorandum of decision that the case was one for divided damages; and

Whereas, subsequent to said decision this cause was set for trial upon the issues of damages as to libellant and cross libellant, but said parties, being desirous that formal trial thereon be avoided, and agreement having been reached with respect to the damages sustained by said respective parties, now, therefore, [58]

It Is Stipulated:

1. The damages sustained by Western Transportation Co., libellant, on its own behalf, as owner

of the Steamer "Barry K" and Barges Nos. 22 and 24, and as bailee of the cargo laden thereon and on behalf of its underwriters, are agreed between the parties to be as follows:

Damage to Barge No. 22.....	\$12,160.70
Damage to "Barry K".....	419.19
Demurrage re Barge No. 22.....	450.00
Demurrage re "Barry K".....	625.00
Loss to cargo on Barges 22 and 24.....	10,903.32
Total.....	<hr/> \$24,558.21

2. The damages sustained by cross-libellant American-Hawaiian Steamship Company are agreed by the parties to be as follows:

Damages suffered by SS "Pennsylvanian".....	\$15,960.71
Demurrage re SS "Pennsylvanian".....	12,366.00
Total.....	<hr/> \$28,326.71

3. It is further agreed that the foregoing stipulation as to damages will make unnecessary trial of said cause upon the issues respecting damages and that the parties now request the Court to make its findings of fact and conclusions and enter final decree herein.

Dated at Portland, Oregon, this 29th day of May, 1942.

WESTERN TRANSPORTA-
TION CO.,

A corporation, Libellant.

By CLARENCE J. YOUNG,

Of Its Proctors.

AMERICAN-HAWAIIAN

STEAMSHIP COMPANY,

A corporation, Cross Libelant.

By ERSKINE WOOD,

Of Its Proctors.

[Endorsed]: Filed June 1, 1942. [59]

And Afterwards, to wit, on the 2nd day of June, 1942, there was duly Filed in said Court, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [60]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

This libel and cross-libel having been tried and argued, briefs submitted and considered and memorandum of decision rendered and filed, I make the following controlling

FINDINGS OF FACT

The "Barry K", a stern-wheeled river boat, with a tow of two barges, and the SS. "Pennsylvanian", an ocean-going steamer, collided in the Willamette River on February 1, 1941. The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the "Barry K" blew the first danger signal.

It follows as a Conclusion of Law that the damages resulting from the collision should be divided.

Counsel are requested to prepare a form of Decree.

Dated at Portland, Oregon, this 2nd day of June, 1942.

CLYDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 2, 1942. [61]

And Afterwards, to wit, on Tuesday, the 2nd day of June, 1942, the same being the 79th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [62]

In the District Court of the United States
for the District of Oregon

Civ. No. 727

WESTERN TRANSPORTATION CO., a corporation,
ration,

Libellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corporation, and THE SS. "PENNSYLVANIAN", her engines, boilers, etc.,
Respondents.

FINAL DECREE

This cause having been tried and argued, and the Court having rendered and filed a memorandum

decision, and having made and filed findings of fact, and having concluded therefrom that the damages resulting from the collision should be divided;

It Is Now Considered, Ordered and Decreed that the damages resulting from the collision be divided equally between the "Pennsylvanian" and the "Barry K".

Dated this 2nd day of June, 1942.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 2, 1942. [63]

And Afterwards, to wit, on Thursday, the 20th day of August, 1942, the same being the 40th Judicial day of the Regular July Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [64]

In the District Court of the United States
for the District of Oregon

No. Civ. 727

WESTERN TRANSPORTATION CO., a corporation,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, and the SS. "PENNSYLVANIAN", her engines, boilers, etc.,

Respondents.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Claimant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Cross Libelant,

vs.

WESTERN TRANSPORTATION CO., a corporation, and the Steamboat "BARRY K", etc., and Barges 22 and 24,

Cross Respondents.

FINAL DECREE

This cause having been tried and argued and the Court having rendered and filed a memorandum decision and having made and filed Findings of Fact and Conclusions of Law, and having concluded that the collision herein involved was the proximate result of negligent handling of both vessels and without any fault on the part of the cargo on either of said vessels, and that damages resulting from the collision should be equally divided between the parties at fault, and the parties having filed a written stipulation in court agreeing that the damages sustained by Western Transportation Company, Libelant, on its own behalf as owner of the Steam River Tug "Barry K" and Barges Nos. 22 and 24, and on behalf of its underwriters, are \$13,654.89, and that the damages sustained by said Western Trans- [65] portation Company as bailee for the owners of the cargo laden on said Barges Nos. 22 and 24, and on behalf of the underwriters in respect to said cargo, are \$10,903.32, and that the damages sustained by Cross-Libelant American-Hawaiian Steamship Company are \$28,326.71;

And the Court having on June 2, 1942, entered an interlocutory decree, mistakenly denominated "Final", which decreed that the damages should be equally divided but did not fix the amount of said damages and did not provide for the recovery thereof by either party against the other, nor make provision for costs or interest, and it is now necessary to enter a final decree;

It Is Now Considered, Ordered and Decreed that Western Transportation Company, as bailee for the owners of the cargo laden on said Barges Nos. 22 and 24 and on behalf of the underwriters in respect to said cargo, recover of and from American-Hawaiian Steamship Company and from its stipulator Firemen's Fund Indemnity Company, as the full loss to said cargo, the sum of \$10,903.32, with interest thereon at the rate of 6% per annum from the date of this decree until paid.

It Is Further Considered, Ordered and Decreed that the "Pennsylvanian" and the "Barry K" were equally at fault for the collision and that the damages thereto should be equally divided; that the damages of Libelant Western Transportation Company, on its own behalf as owner of the Steam Tug "Barry K" and Barges Nos. 22 and 24, and on behalf of its underwriters in respect thereto, are \$13,654.89; that the damages of Cross-Libelant American Hawaiian Steamship Company are \$28,326.71; that American-Hawaiian Steamship Company recover of and from Cross-Respondent Western Transportation Company and from its stipulator American Bonding Company one-half the difference of said damages with interest, said difference being \$14,671.82 and one-half thereof being \$7,335.91; that in addition and by way of recoupment, said American-Hawaiian Steamship Company recover the sum of \$5,451.66, being one-half the amount which said American-Hawaiian Steamship

Company and its stipulator are required herein to pay cargo on said Barges Nos. 22 and 24, making the total recoverable sum of \$12,787.57; [66] that said American-Hawaiian Steamship Company shall recover said last sum of \$12,787.57 of and from Cross-Libelant and its stipulator as aforesaid, with interest thereon at the rate of 6% per annum from the date of this decree until paid.

It Is Ordered and Decreed that each party bear its own costs.

It Is Further Ordered and Decreed that unless this decree be satisfied or an appeal taken therefrom by either party within ten days after service of a copy of this decree upon the opposing party or their respective proctors, the party in whose favor the decree runs may have execution against the opposing party and its stipulator to satisfy this decree.

Dated at Portland, Oregon, August 20th, 1942.

CLAUDE McCOLLOCH,

United States District Judge.

[Endorsed]: Filed August 20, 1942. [67]

And Afterwards, to wit, on the 27th day of August, 1942, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [68]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To George H. Marsh, Clerk and Clarence Young,
Proctor for Libellant and Cross Respondents.

Sirs:

Please take notice that American-Hawaiian Steamship Company, Respondent, Claimant and Cross Libellant in the above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein the 20th day of August, 1942, and from each and every part of said decree.

[69]

Dated August 27th, 1942.

Respectfully,

ERSKINE WOOD,

Proctor for American-Hawaiian Steamship Company, Respondent, Claimant and Cross Respondent, 1310 Yeon Building, Portland, Oregon.

Due and regular service of the foregoing Notice of Appeal is hereby accepted at Portland, Oregon, this 27th day of August, 1942.

CLARENCE J. YOUNG,

Proctor for Libellant and
Cross Respondents.

The within appeal is hereby allowed.

CLAUDE McCOLLOCH,

United States District Judge.

[Endorsed]: Filed August 27, 1942. [70]

And Afterwards, to wit, on the 27th day of August, 1942, there was duly Filed in said Court, a Petition for Appeal with order allowing appeal endorsed thereon, in words and figures as follows, to wit: [71]

[Title of District Court and Cause.]

PETITION FOR APPEAL AND ORDER
ALLOWING IT

American-Hawaiian Steamship Company, Respondent, Claimant and Cross Libelant, being aggrieved by the final decree, rulings and findings of the United States District Court in the above entitled cause, claims an appeal from said decree, rulings and findings, and prays that its said appeal may be allowed.

Dated this 27th day of August, 1942.

AMERICAN-HAWAIIAN

STEAMSHIP COMPANY,

Respondent, Claimant and
Cross Libelant.

By ERSKINE WOOD,

Its Proctor.

The foregoing petition and the appeal therein prayed for are hereby allowed.

CLAUDE McCOLLOCH,

United States District Judge.

Due and regular service of the foregoing Petition for Appeal and Order of Allowance are hereby

accepted at Portland, Oeragon, this 27th day of August, 1942.

CLARENCE J. YOUNG,
Proctor for Libelant and
Cross Respondents.

[Endorsed]: Filed August 27, 1942. [72]

And Afterwards, to wit, on the 27th day of August, 1942, there was duly Filed in said Court, an Assignment of Errors, in words and figures as follows, to wit: [73]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The trial Court erred in the following particulars:

I.

In not holding that prior to and at the time of the collision the "Barry K" and her barges were being negligently navigated on the wrong (left-hand) side of a narrow channel (Willamette River), in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision.

II.

In not holding that the "Barry K" and her barges were being negligently navigated at the time of the collision, in that the pilot was navigating the boat alone in the pilot house, with the master

asleep, and that this proximately contributed to the collision. [74]

III.

In not holding that the "Pennsylvanian" was carefully navigated throughout and was free from fault, and in not entering a decree in favor of American-Hawaiian Steamship Company accordingly.

IV.

In not holding that when the "Barry K" blew her first danger signal, the engines of the "Pennsylvanian" had already been stopped and were still stopped, and in not holding that they were reversed full speed astern at the time of said danger signal.

V.

In holding that "The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the 'Barry K' blew the first danger signal." (Findings of Fact).

VI.

In holding that the "Pennsylvanian" "failed to stop engines when the 'Barry K' blew the first danger signal", and in not holding that they were already stopped, and were reversed, at that signal.

VII.

In holding that both vessels were to blame, and that it was a case for divided damages.

VIII.

In entering the final decree of August 20, 1942, holding both vessels to blame, and apportioning the damages on a basis of mutual fault.

Dated, August 27, 1942.

ERSKINE WOOD,

Proctor for American-Hawaiian Steamship Company, Respondent, Claimant, and Cross Libelant. [75]

Service of the within Assignment of Errors, by certified copy, at Portland, Oregon, this 27th day of August, 1942, is hereby admitted.

CLARENCE J. YOUNG,

Of Proctors for Libelant and
Cross-Respondent.

[Endorsed]: Filed August 27, 1942. [76]

And Afterwards, to wit, on the 27th day of August, 1942, there was duly Filed in said Court, a Bond for Costs on Appeal, in words and figures as follows, to wit: [77]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Present, That Fireman's Fund Indemnity Company, a California corporation, authorized to do a surety business in Oregon, is held and firmly bound unto Western Transportation Co. in the sum of Two Hundred Fifty

No/100ths Dollars (\$250.00) to be paid to said Western Transportation Co., its successors and assigns, for the payment of which well and truly to be made, the undersigned Fireman's Fund Indemnity Company binds itself, its successors and assigns, firmly by these presents.

The condition of this obligation is such that whereas American-Hawaiian Steamship Company has prosecuted, or is about to prosecute, an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a final decree entered in the above entitled Court and cause on the 20th of August, 1942:

Now, Therefore, if the above named appellant, American-Hawaiian Steamship Company, shall prosecute said appeal with [78] effect and pay all costs which may be awarded against it if the appeal is not sustained, then this obligation shall be void, otherwise the same shall remain in full force and effect.

[Seal]

FIREMAN'S FUND INDEMNITY COMPANY,

By E. A. VALENTINE.

Dated August 27, 1942.

Approved as to form, amount and surety.

CLARENCE J. YOUNG,

Proctor for Western Transportation Co.

[Endorsed]: Filed August 27, 1942. [79]

And afterwards, to wit, on Thursday, the 27th day of August, 1942, the same being the 46th Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [80]

[Title of District Court and Cause.]

ORDER STAYING EXECUTION

Pending the appeal of this case, or until the further order of this Court or the Appellate Court,

It Is Ordered that execution of the decree entered in this Court August 20, 1942, be stayed as to both parties, the bonds already filed to stand as superseas bonds.

Dated this 27th day of August, 1942.

CLAUDE MCCOLLOCH,
Judge.

The foregoing Order is hereby stipulated.

CLARENCE J. YOUNG,
Proctor for Libelant.

ERSKINE WOOD,
Proctor for Claimant.

[Endorsed]: Filed August 27, 1942. [81]

And afterwards, to wit, on the 4th day of September, 1942, there was duly filed in said Court, a Citation on Appeal in words and figures as follows, to wit: [82]

District Court of the United States of America
District of Oregon

CITATION ON APPEAL

To Western Transportation Co., and to Clarence J. Young, Esq., its Proctor, Greeting:

Whereas, American-Hawaiian Steamship Company has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law:

You are Therefore Hereby Cited and Admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 2nd day of September, in the year of our Lord, one thousand nine hundred and forty-two.

CLAUDE McCOLLOCH

Judge.

Service accepted Sept. 7, 1942. Clarence J. Young of Proctors for Western Transp. Co.

[Endorsed]: Filed Sep. 4, 1942. [83]

And afterwards, to wit, on Saturday, the 26th day of September, 1942, the same being the 71st

Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [84]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
TRANSCRIPT AND EXHIBITS

On application of appellant, American-Hawaiian Steamship Company, and for good cause shown,

It Is Ordered that the time for filing the transcript and exhibits in the United States Circuit Court of Appeals on said Appellant's appeal in this cause be and it is hereby extended to and including November 20, 1942.

Dated this 26th day of September, 1942.

CLAUDE MCCOLLOCH,
Judge.

The foregoing Order is stipulated.

ERSKINE WOOD,

Proctor for Appellant.

CLARENCE J. YOUNG,

Proctor for Appellees. [85]

And afterwards, to wit, on the 12th day of November, 1942, there was duly filed in said Court, a Notice of Cross Appeal, in words and figures as follows, to wit: [86]

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

To George H. Marsh, Clerk, and Erskine Wood,
Proctor for Respondent, Claimant and Cross
Libelant.

Sirs:

Please take notice that Western Transportation Company, a corporation, libelant and cross-respondent in the above entitled cause, hereby cross appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the decree of this Court entered herein on the 20th day of August, 1942. On said cross appeal Western Transportation Company desires only to review the questions involved in said cause which are stated in the petition for cross appeal filed herewith.

Dated this 12th day of November, 1942.

Respectfully,

CLARENCE J. YOUNG,

Proctor for Western Transportation Company, Libelant and Cross Respondent,
800 Pacific Building,
Portland, Oregon. [87]

The within appeal is hereby allowed.

CLAUDE McCOLLOCH,

United States District Judge.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Notice of Cross Appeal

by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 12th day of November, 1942.

ERSKINE WOOD,

Proctor for American-Hawaiian Steamship Company,
Respondent, Claimant and
Cross Libelant.

[Endorsed]: Filed November 12, 1942. [88]

And afterwards, to wit, on the 12th day of November, 1942, there was duly filed in said Court, a Petition for Cross Appeal, with order allowing appeal endorsed thereon, in words and figures as follows, to wit: [89]

[Title of District Court and Cause.]

PETITION FOR CROSS APPEAL AND
ORDER ALLOWING CROSS APPEAL

To the Honorable Judges of the District Court of
the United States for the District of Oregon:

Sirs:

Western Transportation Company, libelant and cross respondent, being aggrieved by the final decree, rulings and findings of the United States District Court in the above entitled cause, claims a cross appeal from certain portions of said decree, rulings and findings and prays that its said cross appeal may be allowed.

On the appeal the appellant desires to review the following questions only:

1. The propriety of that portion of the final decree holding the "Barry K" equally at fault with the "Pennsylvanian" for the collision and ordering that the damages thereto should be equally divided. [90]

2. The propriety of that portion of the final decree providing that American-Hawaiian Steamship Company recover of and from Western Transportation Company and from its Stipulator, American Bonding Company, one-half the difference of the damages to the "Pennsylvanian" and "Barry K" with interest, said difference being \$14,671.82, and one-half thereof being \$7,335.91.

3. The propriety of that portion of said final decree providing that in addition and by way of recoupment said American-Hawaiian Steamship Company recover the sum of \$5,451.66, being one-half the amount which said American-Hawaiian Steamship Company and its Stipulator are required by the decree to pay cargo on Barges Nos. 22 and 24, making the total recoverable sum of \$12,787.57.

4. The propriety of that portion of said final decree ordering that American-Hawaiian Steamship Company recover the sum of \$12,787.57 of and from Western Transportation Company and its Stipulator with interest thereon at the rate of 6% per annum from the date of the decree until paid.

5. The propriety of that portion of the decree ordering Western Transportation Company to bear its own costs.

6. The failure of the United States District Court to enter a decree in favor of Western Transportation Company for its entire damage.

7. The several matters alleged as error in the assignments of error herewith filed.

And your petitioner will ever pray, etc.

Dated this 12th day of November, 1942.

WESTERN TRANSPORTA-
TION COMPANY, a corpora-
tion,

Libelant and Cross-Respond-
ent.

By CLARENCE J. YOUNG,
Its Proctor.

The foregoing petition and the cross appeal there-
in prayed for are hereby allowed.

CLAUDE McCOLLOCH,
United States District Judge.
[91]

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Petition for Cross Ap-
peal and Order Allowing Cross Appeal by copy, as
prescribed by law is hereby admitted, at Portland,
Oregon, this 12th day of November, 1942.

ERSKINE WOOD,
Proctor for American-Ha-
waiian Steamship Company,
Respondent, Claimant and
Cross Libelant.

[Endorsed]: Filed November 12, 1942. [92]

And afterwards, to wit, on the 12th day of November, 1942, there was duly filed in said Court, an Assignment of Errors on cross-appeal, in words and figures as follows, to wit: [93]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Western Transportation Company, libelant and cross-respondent, hereby assigns errors in the proceedings, decisions and decree of the United States District Court as follows:

1. In holding that there was negligent handling of the "Barry K", constituting a proximate cause of the collision in that it failed to stop engines when the "Barry K" blew the first danger signal.

2. In holding that Western Transportation Company should pay one-half the difference of the damages sustained by the "Barry K" and "Pennsylvanian".

3. In holding that American-Hawaiian Steamship Company should recover by way of recoupment one-half the amount which American-Hawaiian Steamship Company was required to pay cargo on Barges Nos. 22 and 24.

4. In holding that American-Hawaiian Steamship Company should recover from Western Transportation Company any damages whatsoever. [94]

5. In requiring Western Transportation Company to pay its own costs.

6. In failing to hold that the "Barry K" was carefully navigated at all times; that it was free

from fault, and in not entering decree in favor of Western Transportation Company accordingly.

7. In failing to hold that the "Pennsylvanian" was solely at fault in respect to the collision.

8. In failing to hold that the "Pennsylvanian" was at fault in not giving proper or any heed to the several whistle signals by the "Barry K" for a starboard passage, and that this proximately caused the collision.

9. In failing to hold that the "Pennsylvanian" was at fault in crossing the starboard passing signal of the "Barry K" with port passing signal, which circumstances proximately caused the collision.

10. In failing to hold that the "Pennsylvanian" did not ascertain the position of the "Barry K" or take steps to avoid the collision, thus proximately causing same.

11. In failing to hold the "Pennsylvanian" at fault in not changing her course to port, but continuing to starboard and toward shallow water, and that she thereby proximately caused the collision.

12. In failing to hold that under all circumstances then present the "Pennsylvanian" was proceeding at an immoderate rate of speed and thereby proximately caused the collision.

13. In failing to hold that the "Pennsylvanian" was at fault in not using the open and available main ship's channel at and before the time of the collision, thereby proximately causing the same.

14. In failing to hold that the "Pennsylvanian" was at fault in not having available a competent

person to drop the anchors, and in failing to drop the anchors, thereby proximately causing the collision. [95]

15. In failing to decree recovery by Western Transportation Company from American-Hawaiian Steamship Company of Western Transportation Company's entire damage.

Respectfully,

CLARENCE J. YOUNG,

Proctor for Western Transportation Company, Libelant and Cross-Respondent.

State of Oregon,

County of Multnomah—ss.

Service of the foregoing Assignment of Errors by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 12th dat of November, 1942.

ERSKINE WOOD,

Proctor for American-Hawaiian Steamship Company, Claimant, Respondents and Cross-Libelant.

[Endorsed]: Filed November 12, 1942. [96]

And Afterwards, to wit, on the 12th day of November, 1942, there was duly Filed in said Court, a Bond for Costs on cross-appeal in words and figures as follows, to wit: [97]

[Title of District Court and Cause.]

BOND FOR COSTS ON CROSS APPEAL

Know All Men By These Presents, That Fidelity & Deposit Company of Maryland, a Maryland corporation, authorized to and doing a surety business in Oregon, is held and firmly bound unto American-Hawaiian Steamship Company, a corporation, in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) to be paid to said American-Hawaiian Steamship Company, its successors and assigns, for the payment of which well and truly to be made, the undersigned Fidelity & Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The condition of this obligation is such that whereas Western Transportation Company has prosecuted or is about to prosecute a cross appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a final decree entered in the above entitled court and cause on the 20th day of August, 1942; [98]

Now, Therefore, if the above named cross appellant, Western Transportation Company, shall prosecute said appeal with effect and pay all costs which may be awarded against it if the cross appeal is not sustained, then this obligation shall be void,

otherwise the same shall remain in full force and effect.

[Seal]

FIDELITY & DEPOSIT
COMPANY OF MARYLAND
CLARENCE D. PORTER
Its Attorney in Fact
Clarence D. Porter.

Dated this 12th day of November, 1942.

Approved as to form, amount and surety.

ERSKINE WOOD

Proctor for American-Ha-
waiian Steamship Company

State of Oregon

County of Multnomah—ss.

Service of the foregoing Bond for Costs on Cross Appeal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 12th day of November, 1942.

ERSKINE WOOD

Proctor for American - Ha-
waiian Steamship Company,
Respondent, Claimant and
Cross Libelant.

[Endorsed]: Filed November 12, 1942. [99]

And Afterwards, to wit, on the 17th day of November, 1942, there was duly Filed in said Court, a Citation on Cross-Appeal in words and figures as follows, to wit: [100]

District Court of the United States of America
District of Oregon

CITATION ON APPEAL

To American-Hawaiian Steamship Company and to
Erskine Wood and Erskine B. Wood, Its Proc-
tors, Greeting:

Whereas, Western Transportation Company has
lately appealed to the United States Circuit Court
of Appeals for the Ninth Circuit from a decree
rendered in the District Court of the United States
for the District of Oregon, in your favor, and has
given the security required by law;

You Are Therefore Hereby Cited and Admon-
ished to be and Appeal before said United States
Circuit Court of Appeals for the Ninth Circuit, at
San Francisco, California, within thirty days from
the date hereof, to show cause, if any there be, why
the said decree should not be corrected, and speedy
justice should not be done to the parties in that
behalf.

Given under my hand, at Portland, in said Dis-
trict, this 17th day of November, in the year of our
Lord, one thousand nine hundred and forty-two.

CLAUDE McCOLLOCH

Judge.

United States of America,
State of Oregon,
County of Multnomah—ss.

Service of the foregoing Citation on Appeal, by

copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 17th day of November, 1942.

ERSKINE WOOD

Of Proctors for Respondents.

[Endorsed]: Filed Nov. 17, 1942. [101]

And Afterwards, to wit, on the 19th day of November, 1942, there was duly Filed in said Court, a Copy of Order of the *United Circuit* Court of Appeals extending time to docket transcript of record, in words and figures as follows, to wit: [102]

United States Circuit Court of Appeals
For the Ninth Circuit

AMERICAN HAWAIIAN SS COMPANY,
Appellant,

vs.

WESTERN TRANSPORTATION COMPANY,
Appellee.

and

WESTERN TRANSPORTATION COMPANY,
Appellant,

vs.

AMERICAN HAWAIIAN SS COMPANY,
Appellee.

ORDER EXTENDING TIME TO FILE
APOSTLES ON APPEALS

Upon consideration of the telephonic request of Mr. Erskine Wood, proctor for American Hawaiian Steamship Company, and good cause therefor appearing, It Is Ordered that the time within which the certified apostles on appeals in above case may be filed in this court and the cause docketed be, and hereby is extended to and including November 30, 1942.

CURTIS D. WILBUR
Senior United States
Circuit Judge.

Dated: San Francisco, Calif., November 16, 1942.

[Endorsed]: Order, etc. Filed Nov. 16, 1942. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Nov. 19, 1942. G. H. Marsh, Clerk. [103]

And Afterwards, to wit, on Tuesday, the 14th day of November, 1942, the same being the 14th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable Claude McCulloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [104]

In the District Court of the United States

For the District of Oregon

No. Civ. 727

WESTERN TRANSPORTATION CO., a corporation,
tion,

Libelant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation, and the SS "PENNSYLVANIAN", her engines, boilers, etc.,

Respondents.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Claimant.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,

Cross-Libelant,

vs.

WESTERN TRANSPORTATION CO., a corporation, and the steamboat "BARRY K", Etc., and Barges 22 and 24,

Cross-Respondents.

ORDER TO SEND TO APPELLATE COURT
ORIGINAL TRANSCRIPT OF TESTIMONY
AND ORIGINAL EXHIBITS

It Is Hereby Ordered that the Clerk of this Court send to the United States Circuit Court of Appeals at San Francisco the original transcript of the testimony and all original exhibits in this Court and

cause, for use on the appeals, in this cause, to said Appellate Court.

Dated this 17th day of November, 1942.

CLAUDE McCOLLOCH

Judge.

The foregoing order jointly requested by:

ERSKINE WOOD

Proctor for American-
Hawaiian Steamship
Company

CLARENCE J. YOUNG

Proctor for Western
Transportation Co.

[Endorsed]: Filed Nov. 17, 1942. [105]

CERTIFICATE OF CLERK TO
APOSTLES ON APPEAL

United States of America
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 105 inclusive, constitute the apostles on appeal in a cause in said court numbered Civil 727, in which the Western Transportation Company is libelant, appellee, and appellant, on the cross-appeal, and the American-Hawaiian Steamship Company, a corporation, is respondent and claimant of the SS "Pennsylvanian", and appellant, and appellee on the cross-appeal; that said transcript has been

prepared by me in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit; that I have compared the foregoing apostles with the original record thereof and that the foregoing apostles are a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$14.30 for comparing and certifying the within transcript, making a total of \$19.30, and that the same has been paid by said appellants; and \$5.00 for filing Notice of Cross-Appellant and \$5.70 for comparing and certifying transcript required by the cross-appellant, making a total of \$10.70, which has been paid by cross-appellant.

I further certify that I am transmitting with said transcript, by order of the Court, the original testimony filed in said cause and Libelant's exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 16, and Respondent's exhibits 9, 10, 11, 12, 13, 14, 17 and 18, being all of the original exhibits introduced in evidence in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 24th day of November, 1942.

[Seal]

G. H. MARSH,
Clerk. [106]

TRANSCRIPT OF EVIDENCE

Portland, Oregon, Tuesday, July 15, 1941

8:00 o'clock A.M.

Before:

Honorable Claude McColloch, Judge.

Appearances:

Messrs. Dey, Hampson & Nelson (By Messrs. Clarence J. Young and Richard B. Maxwell), Proctors for Western Transportation Company, Libelant, Claimant and Respondent to Cross-Libel. [1*]

Messrs. Wood, Matthieseen & Wood (By Messrs. Erskine Wood and Erskine B. Wood), Proctors for American-Hawaiian Steamship Company, Claimant of the Pennsylvanian, and Respondent to the original Libel, and Cross-Libelant.

PROCEEDINGS

The Court: Ready?

Mr. Young: Yes, your Honor. If the Court please, as a preliminary matter, I should like the record to show that it has been stipulated between counsel for the American-Hawaiian Steamship Company and the Steamship Pennsylvanian, on the one hand, and myself as counsel for Western Transportation Company and the Barry K, that this cause shall be tried at this time solely upon the

*Page numbering appearing at top of page of original Reporter's Transcript.

question of liability; that the matter of damages shall be deferred to a future time, either with the possibility of some agreement between the parties respecting what those damages are, or possibly a reference to a Master. That is agreeable, I understand?

Mr. Wood: I understand that was his Honor's own wish also.

The Court: Quite satisfactory.

Mr. Young: I should like at this time also, your Honor, to make a slight amendment in the original libel of Western Transportation Company against the American-Hawaiian Steamship [2] Company, on page 2, Article IV, line 21. At the present time the language reads that Barge 22 was "made up on the port bow of the Barry K." The word "port" should be omitted. The Barge 22 was being pushed on the bow of the Barry K, and the word "port" was inserted there by inadvertence. I should therefore like for the word "port," in line 21, the third word in the line, to be omitted.

The Court: Is there objection?

Mr. Wood: No objection.

LIBELANT'S EVIDENCE

Mr. Young: Mr. Wood and I have agreed upon the introduction of certain exhibits in evidence. I should like therefore at this time on behalf of Libelant to have marked certain maps and photographs as exhibits on behalf of Libelant. The first one——

The Court: Before we get into the trial, Mr.

Wood mentioned a view of the locus in quo. Do you have any ideas about that?

Mr. Young: I have no objection to that—the accident occurred at night, your Honor understands.

The Court: We will leave it this way; at the request of either party, or on my own suggestion, a view will be had at the conclusion of testimony.

Mr. Young: Very well.

I should like the reporter now to mark as Libelant's Exhibit 1 a map designated "Port of Portland Including Vancouver," [3] and prepared by the United States Coast and Geodetic Survey, being accurate as of August 24, 1940. Council has stipulated that may be introduced.

(The map, so offered, was received in evidence and marked Libelant's Exhibit 1.)

Mr. Young: We now offer in evidence, pursuant to this stipulation, a map of the Willamette River from its mouth to the Broadway Bridge, prepared under date of July 23, 1940, by the United States Engineers' office, Portland, Oregon.

(The map, so offered, was received in evidence and marked Libelant's Exhibit 2.)

Mr. Young: Next is a photograph showing the forward portion of the tugboat Barry K which was owned by the Western Transportation Company and is involved in this accident.

(The photograph, so offered, was received in evidence and marked Libelant's Exhibit 3.)

Mr. Young: Libelant's 4 is another photograph of the forward part of the Barry K taken from a

slightly different position from the previous photograph.

(The photograph, so offered, was received in evidence and marked Libelant's Exhibit 4.)

Mr. Young: Libelant's 5 is a photograph showing the Barry K pushing two barges, one, No. 22, on the nose of the Barry K, and one, No. 24, on the forward port side of the Barry K. [4]

(The photograph, so offered, was received in evidence and marked Libelant's Exhibit 5.)

Mr. Young: The photograph which has just been identified shows the Barry K with its barges made up as they were at the time of the collision.

Next is a photograph of the Barry K pushing the same two barges which are made up in the same manner, the picture in this instance showing the Barry K coming toward the camera, and it is taken from the starboard side of the Barry K.

(The photograph, so offered, was received in evidence and marked Libelant's Exhibit 6.)

Mr. Young: Libelant's 7 is another photograph of the Barry K pushing the same two barges, 24 and 22, which are made up in the same manner as previously indicated. This photograph shows the Barry K with its barges proceeding toward the camera, and it is taken from the port side of the Barry K.

(The photograph, so offered, was received in evidence and marked Libelant's Exhibit 7.)

Mr. Young: Those are all of the exhibits at this time, your Honor.

(Thereupon opening statements were made in behalf of the respective parties, after which the following testimony was given:) [5]

WM. A. REED,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name, please.

A. Wm. A. Reed.

Q. And where do you live?

A. 7576 North Fowler.

Q. In Portland? A. In Portland.

Q. And how long have you lived here?

A. Since about 1922.

Q. What is your occupation?

A. Master and pilot.

Q. How long have you held a Master's license?

A. I have held a Master's license since about 1922.

Q. And what does that Master's license include?

A. It includes a Master of unlimited steam and motor vessels and first-class pilot from Astoria to Camas and West Linn.

Q. During what period of time have you operated boats on the Willamette and Columbia rivers?

A. For about the past twenty years.

Q. And to what extent has that experience included—— A. Pardon——

Q. What? [6]

(Testimony of Wm. A. Reed.)

A. That question again. You say the Willamette and Columbia?

Q. Yes.

A. About twenty-three years.

Q. And to what extent has that experience included the operation of boats over around what is known as Post Office Bar in the lower Willamette?

A. Oh, the past nineteen or twenty years.

Q. Were you the pilot on the Barry "K" at the time of the collision which occurred with the Pennsylvanian on February 1 of this year.

A. I were.

Q. You were in the employ of the Western Transportation Company? A. Yes, sir.

Q. Captain, I would like you to give to the Court the dimensions of the Barry "K". Let us in the first place give the Court the length of the Barry "K". A. 160 feet.

Q. Does that include the wheel?

A. No, that is the hull.

Q. She is a stern-wheeler, is she not?

A. Yes, sir.

Q. And how long is the stern wheel?

A. Well, the wheel housing would go back, I should judge, about thirty feet.

Q. Now, what superstructure is there on the Barry "K"? [7]

A. Well, there is a lower house and a cabin house, a Texas and a pilot house.

Q. Now, the lower house, how high is that above the deck of the vessel? A. Nine feet.

(Testimony of Wm. A. Reed.)

Q. And throughout what length of the hull does that extend?

A. Well, the house is 129 feet long.

Q. Now, immediately above the house is what deck?

A. The cabin.

Q. And is there a further housing on that deck?

A. Yes, sir.

Q. What is that?

A. The Texas.

Q. That is the Texas, as you call it?

A. Yes, sir.

Q. And how high is the Texas?

A. Seven feet.

Q. Throughout what distance does that Texas extend along the cabin deck or along lengthwise of the ship?

A. Twenty-two and a half feet.

Q. And what is above the Texas?

A. Pilot house.

Q. And how high is the pilot house?

A. Seven and a half feet.

Q. What is the total distance from the water line to the top [8] of the pilot house?

A. Approximately about thirty-four feet, thirty-four or thirty-five feet.

Q. Now, does she have a whistle behind the pilot house?

A. Yes.

Q. And how high does that extend above the water line or above the top of the pilot house?

A. About 20 feet, 15 to 20.

Q. The pleadings, I think, in this case show

(Testimony of Wm. A. Reed.)

that at the time of the accident you were pushing two barges, numbered 22 and 24; is that correct?

A. Right.

Q. Where was barge No. 22?

A. Directly on the bow.

Q. And what was the length of barge 22?

A. About 135 feet.

Q. Did she have a house on top of her?

A. She did.

Q. And throughout what length of the deck of the barge did the house extend?

A. Oh, for about eight to ten feet from each end.

Q. Which would make the length of the house about what?

A. About 115—10 or 15 feet.

Q. And what is the height of the house above the water line?

A. Oh, about twenty feet. [9]

Q. That would vary somewhat in accordance with the load carried, would it? A. Right.

Q. Of what material was the barge constructed?

A. The hull was steel and the house was wood.

Q. Now, were the dimensions of barge No. 24 substantially the same as those of barge 22?

A. The same exactly.

Q. They were sister barges?

A. Yes, sir.

Q. Where was barge No. 24?

A. On the port bow.

(Testimony of Wm. A. Reed.)

Q. How far back from the forward end of barge 22 would you say the forward end of barge 24 was?

A. About one-fourth of the way.

Q. Was the Barry "K" equipped with whistle?

A. She was.

Q. Where was the whistle located?

A. Forward of the smokestack.

Q. Where with reference to the top of the pilot house?

A. Oh, better than three feet above.

Q. Was that an efficient whistle?

A. Yes, sir.

Q. Do you know throughout what distance it could be heard?

A. Well, I don't know. I have heard her six miles when I was [10] home. I have heard her over at Vancouver.

Q. The accident occurred at night, I believe?

A. It did.

Q. Now, at the time that this accident occurred, what lights were there on the Barry "K"?

A. Two mast lights and a starboard and port light.

Q. Now, just describe to the Court what those mast lights were.

A. They were two bright white lights on the mast, over the pilot house, about three feet apart or a little better.

Q. One over the other?

A. One over the other, in a vertical line.

(Testimony of Wm. A. Reed.)

Q. State whether or not those lights shown all around the horizon? A. They did.

Q. Where was the green light to which you refer?

A. On the starboard side, built up from the bridge, the end of the bridge.

Q. And throughout what arc of the horizon did that light show?

A. Ten points of the compass.

Q. Ten points of the compass? A. Yes.

Q. Commencing straight ahead and swinging around how far?

A. Two points abaft of the beam on the starboard side.

Q. What is the beam to which you refer?

A. That is athwartship or straight across the vessel.

Q. And this light cast its rays to a point two points back of [11] that toward the rear; is that right? A. That is right.

Q. Now, where was the red light?

A. On the port side, right opposite the starboard side, on the port side of the pilot house.

Q. And throughout what part of the horizon or arc of the horizon did that light cast its rays?

A. Just the same as the starboard on the port side and straight ahead to two points abaft of beam.

Q. The photograph which has been introduced in evidence shows a light on the bow of the Barry

(Testimony of Wm. A. Reed.)

“K” immediately above the main deck. What is that light?

A. Oh, that is your bow light or your range light, to range up with your mast light.

Q. Was that light lighted at the time of the accident? A. No, sir.

Q. Why not?

A. Because there was a twenty-foot house on that barge right directly ahead of it about 10 or 15 feet and the reflection would have been right back in my eyes; I couldn't have seen anything on a dark night.

Q. Would it have been possible for anyone looking toward the forward end of the Barry “K” to have seen that light had it been lighted?

A. Yes. [12]

Q. A person looking toward the forward end of the Barry “K”?

A. Oh, toward the forward end of the Barry “K”? No.

Q. Why not?

A. That 20-foot house directly ahead of it.

Q. Now, what lights were there on the barges?

A. We had a coal oil lantern on the starboard, forward corner of barge No. 22, which was on the bow of the Barry “K”.

Q. What color?

A. White; oil lantern. And we had the same identical lantern on the port, forward corner of barge No. 24; and also one on the port, after corner of barge 24.

(Testimony of Wm. A. Reed.)

Q. Those were all white lights?

A. All white lights.

Q. And about how high above the deck of the barge would you say those lights were?

A. Oh, five and six feet.

Q. And to what were they affixed?

A. A nail or a hook in the corner of that house.

Q. Now, throughout what arc of the horizon did those three lights themselves cast their rays; the three lights together, I mean?

A. Well, a good three-quarters of an arc of a circle.

Q. To any ship approaching from the forward side—part of the Barry “K”, were those lights visible? A. They were.

Q. And how far ahead of the Barry “K” was it possible for one to [13] see those lights?

A. A good dark, clear night, you ought to see them at least two miles or better.

Q. And was it possible to see those lights two miles on the night of this accident?

A. It was.

Q. Will you state whether or not those lights on the barges were affixed in the manner in which they have customarily been fixed?

A. The same thing exactly.

Q. Over what period of time?

A. Ever since I can remember.

Q. Ever since you can remember? A. Yes.

Q. That would be how far back?

(Testimony of Wm. A. Reed.)

A. Twenty years, twenty-three.

Q. In other words, during twenty years of time it had been customary to use the lights on those barges in that manner?

A. Practically the same kind of lights.

Q. Do you have here in the courtroom a light of the same type as that which was used on one of those barges? A. I have.

Q. Where is that light?

A. Right over by Captain Williams.

Q. Is this a light that was on the barges at the time of the accident? A. No. [14]

Q. Do you know where those lights are at the present time?

A. No. It is a standard lantern.

Q. They were a standard lantern?

A. They were all a standard lantern.

Q. Is the lantern which I am about to show you one identical in construction with those lights?

A. Absolutely.

Q. Will you examine the lantern now which the bailiff is handing you and state whether that is such a lantern?

A. That is one of the standard lanterns that they use on their barges and log rafts.

Q. And was it a lantern of that type that you had on barges 22 and 24 the night of the accident?

A. It was.

Q. What can you say as to whether or not the globes in those lights at that time were clean?

(Testimony of Wm. A. Reed.)

A. That is always a regular routine of the watchman and the deck boy; takes the lanterns off the barges at daylight to wash those globes and fill the tanks with oil.

Mr. Young: We offer this lantern in evidence.

The Court: I think you ought to explain to Mr. Maxwell and Mr. Wood, Jr., what coal oil is.

Mr. Maxwell: I don't know; I am from Indiana.

Mr. Young: Q. Well, what are coal oil lamps?

A. Kerosene. [15]

(The lantern, so offered, was received in evidence and marked Libellant's Exhibit 8.)

Mr. Young: Q. Was the steering gear of the Barry "K" in good condition? A. Yes, sir.

Q. What was your official capacity on the Barry "K" at the time of the accident?

A. Pilot.

Q. Had you at any previous time been the Master of the Barry "K"? A. Yes, sir.

Q. During what period of time?

A. The 11th of May, 1940, up until she went on the paper run, which I am not positive, but I think it was along in December.

Q. Of 1940? A. Yes, sir.

Q. Prior to May of 1940, had the Western Transportation Company owned the Barry "K"; do you know?

A. They had owned her for sometime, but she was not in commission.

(Testimony of Wm. A. Reed.)

Q. Not in commission? A. No.

Q. You took her over when she went into commission for Western Transportation Company?

A. Yes, sir.

Q. And then commencing in December, why did you cease to be the Master? [16]

A. Well, Captain Williams was an older man in the company and the *Claire*, which he had been on on the paper run, was tied up for repairs, and naturally in the seniority rule he took the Master's place on the *Barry "K"*.

Q. And was Captain Williams on the *Barry "K"* at the time of the accident? A. He was.

The Court: Whose seniority rule?

A. Captain Williams seniority.

Mr. Young: Q. The Court has inquired as to whose seniority rule. What rules were those?

A. Why, the oldest man really has the best position.

Q. I mean, were those union rules?

A. Oh, no, just company rules.

Q. Company rules? A. Yes.

Q. The principle being, as you say, the oldest man has the best position; is that it?

A. That is it.

Q. Now, where did you start your trip the night of this accident?

A. I started mine just below the Vancouver bridge.

Q. At what time did you go on duty; do you remember? A. 12:10.

(Testimony of Wm. A. Reed.)

Q. On what date was this? [17]

A. February 1.

Q. The date of the accident?

A. Yes, sir.

Q. And where was your ship bound?

A. The Weidler Dock in Portland.

Q. You have already described the manner in which the barges were attached to the Barry "K". What loads did they carry?

A. They carried paper.

Q. Did they both carry about the same amount?

A. No, 24 had a little more of a load on her than 22.

Q. And what effect did that have on the manner in which she rested in the water?

A. Barge 24 would draw about six inches to a foot more than barge 22.

Q. What did barge 22 draw?

A. About four feet, approximately.

Q. And barge 24 about four feet and a half?

A. It would be about a half to a foot deeper.

Q. And what did the Barry "K" draw?

A. Two foot eight.

Q. Now, which way did you proceed after leaving Vancouver?

A. On down the Columbia.

Q. And then after coming down the Columbia, where did you go?

A. Swung into the mouth of the Willamette.

(Testimony of Wm. A. Reed.)

Q. After swinging into the mouth of the Willamette, which side [18] of the river did you proceed up?

A. I was on the east side of the river, or that side that lies to my left.

Q. What was the condition of the weather on this night?

A. Oh, it was clear and dark and a breeze blowing.

Q. How much of a breeze was there?

A. Oh, about ten or fifteen miles, I should judge.

Q. And from which direction was the breeze coming? A. Easterly breeze.

Q. In proceeding upstream on the left-hand side, why did you take that position?

A. To keep from crossing the ship channel and it is the way that the river craft has always proceeded.

Q. During what period of time have river craft always proceeded up the left-hand side of the channel at that point?

A. In all my experiences in the river.

Q. And that is since when?

A. About 1918, but I was down in Astoria, but up here for the last 23 or 24 years.

Q. Have you ever known any exceptions to that rule to exist?

A. No, I can't recall any. There might be.

Q. Why is it that the river boats travel up that side of the stream?

(Testimony of Wm. A. Reed.)

A. Well, it is the shallower water, leaves the deeper water which lies to the west side for the ocean-going vessels. [19]

Q. Where is the channel in the river between the Willamette River entrance and, let us say, the Multnomah channel entrance?

A. Well, the channel varies from easterly to westerly. By the Multnomah channel it is a little more to the east side; then down to the Post Office Bar Range, it is more to the west side; follows that down, on down to Post Office Lower, clear on down to Gillihan's, and then from the Willamette River entrance practically in the middle of the river from there on out to the mouth.

Q. Where is the shallower water in coming upstream from the mouth of the Willamette to the Multnomah channel entrance?

A. The more shallow would be on the east side practically up to Post Office Bar and then there is a shoal—there is no snags on it that I know of—just up to the mouth of the Willamette River entrance.

Q. How wide is that shallow water around Post Office Bar on the east side?

A. Oh, it will go 200 feet.

Q. 200 feet? A. Or better, yes.

Q. Could you operate your river boat and its barges through that water?

A. Practically all of them.

Q. With safety?

(Testimony of Wm. A. Reed.)

A. Practically all of them. [20]

Q. Pardon? A. Practically all of it.

Mr. Young: Does your Honor hear this all right? I would like to have the witness speak a little more loudly, if necessary.

Q. Now, on the west side of the river, what is there located there?

A. Well, there is a mud bank consisting, from the mouth up—it is a shoal from the mouth, I would say, up to Gillihan's Landing, and from there there is a mud bank which drops up, I should say, from three to four feet, and from there on up there is a piling dike driven above Post Office Bar with a short jog and then there is another dike that runs clear on up to the Multnomah channel. This dike consists of piling, which sticks out of the water three to four feet and I presume if it is according to all of our other dikes, which I think it is, it is filled in with rock. That is to keep the wash from the island, caving the banks.

Q. Now, if you were proceeding upstream with barges, such as you had, and you were proceeding up the west side instead of the east side, how far off that dike would you have to remain in order to be reasonably safe?

A. Well, that depends on your wind velocity and swells; the wheel would be into that dike; if there was an east wind you would have to bear into the wind with the bow of your tow in order to keep from blowing ashore. You would be com-

(Testimony of Wm. A. Reed.)

ing up at a [21] right angle with your bow headed more into the wind than the course you are taking, to eliminate the slip and the wind resistance upon the boat, to keep your wheel out of that dike. The bow of your tow would be, let's see—my tow was, I would say, better than 200 feet, the bow of my tow would have to be out from that dike practically, to be safe.

Q. What was the total length over-all from the front end of barge No. 22 to the rear of your stern wheel?

A. Oh, about 125 feet, approximately. 325 feet.

Q. 325 feet?

A. The boat is 160, the barge is 135, with about a 25-foot or 30-foot wheel house.

Q. In answering one of your questions just now, you used the word "slip." What do you mean by that?

A. Well, it is the same as a wind blowing anything sideways; it is sliding instead of going ahead; it is sliding sideways, is slippage.

Q. Is that slippage something which a light-draft boat is more subject to than a deep-draft boat?

A. Yes, sir.

Q. And why is that?

A. Well, it is not drawing the water, flat-bottomed.

Q. Has it been your observation that ocean-going ships are subject to slippage as river boats?

Mr. Wood: Pardon me. He hasn't shown any knowledge of ocean- [22] going ships yet.

(Testimony of Wm. A. Reed.)

Mr. Young: Strike the question.

Q. Now, what has been your observation with respect to the effect of displacement swell from ocean ships and its effect upon river boats?

A. Well, it will break your lines and I have seen it tear cavils off the boats.

Q. For you to operate your river boat up the west side of that channel and meet an ocean-going ship going downstream, would there be any hazard to you from the displacement swell of the ocean ship?

A. Oh, yes, considerable.

Q. Will you explain that answer to the Court?

A. Well, there would be a closer passing and then the ship being on the swing, the outside swing of the ship throws a bigger swell than the inside, and we would be close to the dike. If you would break a line or a cavil and the wind was blowing, you would be on the dike before you would ever get your tow made up again or catch your barges.

Q. On the other hand, if you were traveling up the east side of the stream when that same ocean ship were coming downstream, what effect, if any, would the displacement swell have upon you?

A. It wouldn't have as much effect, but if anything let go, you would have the full width of the river to regain your tow and get under way before blowing ashore. [23]

Q. We have assumed we all understand what you mean by displacement swell, but will you explain that?

(Testimony of Wm. A. Reed.)

A. Well, rushing through the water, just the same as forcing your hand through the water, it will make ripples on the water; naturally the larger object moving through the water would cause larger waves or what we term the swells.

Q. And the displacement swell is the ripple caused by the bow of the ship?

A. Yes, the speed of the ship and the size of the vessel.

Q. Now, has it been your observation that there is any swell or disturbance in the water caused by the propeller of large ocean ships?

A. Well, yes, there is a suction and then I would say a kick, if you were close to them.

Q. Would that have any effect upon your operation of the river boats if you were proceeding up the west side of the river instead of the east at Post Office Bar?

A. It would.

Q. And what?

A. Because your ships keep close to that east shore going down. That is their regular course that they have always run.

Q. To what extent has it been your observation that the Willamette River in the vicinity of Post Office Bar is used by tug boats either pushing barges or pulling log rafts?

A. They always operate on the east shore. [24]

Q. I mean to what extent is the river used at all? How frequently does traffic go up and down of that nature?

A. That is pretty hard to estimate. Sometimes

(Testimony of Wm. A. Reed.)

you will find lots of them. I have passed two and three right along in there all at once and then other times you go by you won't find any.

Q. You have mentioned that there was an easterly breeze blowing at the time of the accident?

A. Yes, sir.

Q. What is the prevailing wind in this particular area?

A. Well, at that time of the year it is practically an east wind.

Q. And what effect does the east wind have upon equipment such as that which you were operating at the time of the accident?

A. It would naturally carry you towards the west shore.

Q. You have indicated to the Court the height of the barges and the height of the superstructure on the "Barry K". Does that offer resistance to the wind from the east? A. Yes, sir.

Q. And the effect of an east wind would be to do what to your boat and barges?

A. Well, I generally always stay on the farther side towards the wind.

Q. Toward the wind? A. Yes.

Q. Now, is there any protection which your river boat would have, using the east side of the river, going upstream, rather than the [25] west side, with respect to wind?

A. It would at that point, yes.

Q. What protection?

(Testimony of Wm. A. Reed.)

A. Well, there is sand dredge dumps along there built up like a dike, with willows and cotton-woods growing onto them that causes wind protection.

Q. That is, you mean a wind-break?

A. A wind-break.

Q. These willows are on the east side of the stream, you say? A. Yes, sir.

Q. Now, referring again to this matter of side-slipping, suppose that you were proceeding upstream on the west side of the river, would you be on the outside of the curve of the stream?

A. Yes, sir.

Q. And would the tendency for you to slip sideways there be greater than it would be if you were on the inside of the curve?

A. Yes, sir.

Q. And why?

A. On account of your wind blowing there, if there is any current.

Q. And apart from the wind, would there be a tendency toward side-slipping?

A. Apart from the wind?

Q. Yes.

A. You are bound to slip as you turn; you will slip to the outside of your curve; slide to it. [26]

Q. Then do I understand that by staying on the east side of the stream you avoid the sideslipping to a considerable degree?

A. You will hug your nose of your tow into

(Testimony of Wm. A. Reed.)

the bank a whole lot more easier, your slippage, than you would going on the outside contour.

Q. I may have asked you this question and if I did you needn't answer it, but could your Barry "K" with these barges proceed with complete safety up the east edge of the stream outside the channel? A. Yes, sir.

Q. Based upon your experience as a Master of river boats and the pilots and operating in this territory, what is your opinion as to whether it would be either safe or practicable for river boats to proceed upstream on the west side of the channel at this particular point?

A. It would not be safe.

Q. And you have indicated the reasons in your prior answers? A. Yes.

Q. As you were proceeding upstream with the Barry "K" and barges, where were you when you first observed the steamer *Pennsylvanian*?

A. Right around Post Office Bar No. 3.

Q. Is Post Office Bar No. 3 the place to which I am now pointing on the engineer's map?

A. It is.

Q. And at that particular time, Captain, where did you see the [27] *Pennsylvanian*?

A. Approximately around Willamette Slough light.

Q. Around the Willamette Slough light?

A. As near as I could tell, yes.

Q. And is this—

(Testimony of Wm. A. Reed.)

A. Multnomah Channel.

Q. You mean the Multnomah Channel?

A. Technically known as Willamette Slough.

Q. I am now pointing to what is marked on this map as the Multnomah Channel entrance; is that the place to which you refer?

A. Yes sir.

Q. And was the Pennsylvanian out in the stream at that point?

A. Yes, she was coming down on the range.

Q. When you refer to the "range," what do you mean?

A. Well, there are two lights, one directly behind the other, which, if a person keeps in line, will put him right down the deepest part of the water or the channel.

Q. Now, these lights that you say are close together, where are they located?

A. At Post Office Range right about in the middle of the starting of the contour of the river, of the curvature of the river.

Q. Are you now referring to what is on this map marked as Post Office Bar Front and Post Office Bar Rear? A. Right.

Q. Is the Post Office Bar Front light out in the water? [28] A. Yes, sir.

Q. And where is Post Office Bar Rear located?

A. It sets back ashore on the land.

Q. Then this range to which you refer is a line drawn between those two lights and extending upstream? A. Yes, sir.

(Testimony of Wm. A. Reed.)

Q. So that as I understand your testimony, at the time that the Barry "K" was about opposite Post Office Bar No. 3 you were able to see the Pennsylvanian on the Post Office range at a point about opposite Multnomah Channel?

A. I could see her two mast lights when I first saw her.

Q. You could see her two mast lights? What color were they? A. White.

Q. Were you able to see any of her side lights?

A. Just shortly after that I saw her starboard light.

Q. When you saw her two mast lights and the starboard light, what did that indicate to you as to the course of the Pennsylvanian?

A. That she was coming down on Post Office range.

Q. I have assumed this was the Pennsylvanian. Did you at that time know it was?

A. No, sir.

Q. You didn't learn until after the accident what the name of the ship was? A. No, sir.

Q. For convenience, I will call it the Pennsylvanian, because we [29] are in agreement, I think, on that. Now, Captain, what did you do after you observed this ship which proved to be the Pennsylvanian?

A. I blew him two whistles.

Q. How far apart would you judge the Barry "K" was from the Pennsylvanian at that time?

(Testimony of Wm. A. Reed.)

A. Well, it is pretty hard to judge; I would say between three and four thousand feet, about three-quarters of a mile?

Q. About three-quarters of a mile?

A. Yes.

Q. And at that time you blew two blasts?

A. Yes, sir.

Q. What do those two blasts mean?

A. Pass to starboard to each other; I was supposed to stay on the east side of the channel.

Q. That is, you stay on the east side of the channel and your right side would pass the right side of the Pennsylvanian? A. Right.

Q. Did you receive any answer to that whistle?

A. Yes, sir.

Q. What answer? A. One whistle.

Q. And what did that mean to you?

A. That he crossed my whistles or misunderstood me, that he wanted to pass to port. [30]

Q. The words "crossed your signals" meant what?

A. Answering one with two or two with one.

Q. Now, when he answered with one, what did you next do?

A. I blew four short whistles or a danger whistle.

Q. Was the Barry "K" approaching the Pennsylvanian during this time?

A. Yes, sir.

Q. At the time that you blew this danger

(Testimony of Wm. A. Reed.)

whistle to which you have referred, how far apart would you say the Barry "K" was from the Pennsylvanian then?

A. Well, it wasn't very long after he give me the one whistle; I would say I cut it down about a thousand—five hundred to a thousand feet maybe; 2,500, 3,000.

Q. That is, you were about 2,500 to 3,000 feet apart at this time?

A. That is approximate, because it is pretty hard to tell the speed of the other vessel.

Q. Now, during the time that this whistling had occurred, was there any change in the course of the Pennsylvanian? A. Yes.

Q. What?

A. She swung to her starboard, coming more head on.

Q. How could you determine that she had swung to starboard?

A. You could see her mast lights swing and lining up more in a straight line.

Q. Were you able to see her red light?

A. No, not till shortly afterwards. [31]

Q. Not till afterwards? A. Yes.

Q. During the same period of time what was the course of your own Barry "K" and the barges?

A. I was bearing more to the east shore or to my port.

Q. What would you say was the approximate distance that the Barry "K" was maintaining from

(Testimony of Wm. A. Reed.)

the east shore line from the time that you entered the Willamette River until you got up to, say, Post Office Bar No. 3 light?

A. Well, I was part of the time completely east of the ship channel and part of the time right on the east edge or on the easterly side of the main ship channel.

Q. But commencing with the time that you first signalled to the Pennsylvanian, what then did you do about your course? A. Pardon?

(The last question was read by the reporter.)

A. Still kept bearing more to the east shore, giving more wheel.

Q. Now, you have testified that you gave four blasts to the Barry "K" after she crossed signals with you? A. Yes.

Q. What happened after that; did you receive an answer to the four blasts? A. No, sir.

Q. Then what did you do?

A. I blew him another starboard passing whistle, two shorts. [32]

Q. Did you have an answer to that?

A. No, sir.

Q. What next did you do?

A. I blew another danger whistle.

Q. That is four blasts? A. Yes, sir.

Q. Was there any answer to that?

A. No, sir.

(Testimony of Wm. A. Reed.)

Q. And during this time what was the course of the Barry "K"?

A. Still kept bearing over to the shoal water, figuring any minute that the other ship would understand my two whistles and go back to her ship channel.

Q. And after you had given the last danger signal to which you have testified, did you give any further signals?

A. I gave them two more shorts.

Q. And up to this time what had you done, if anything, about the speed of the boat?

A. I stopped my engine after the third whistle.

Q. Now, from the time that you had entered the Willamette River up to the time that you first saw the Pennsylvanian what would you say was the speed of the Barry "K"?

A. Oh, about six miles per hour.

Q. And at what point of time did you stop your engines? A. What point of time?

Q. Yes. [33]

A. Well, it is pretty hard to judge. She was bearing down pretty close. I would judge a thousand feet, a little over.

Q. Following the time that you stopped your engines, was there any further signalling?

A. Yes, sir.

Q. What?

A. The other ship gave me three whistles, indicating that his engines were going full speed astern.

(Testimony of Wm. A. Reed.)

Q. About how far apart would you say you were when you received these three whistles from the Pennsylvanian?

A. Approximately about a thousand feet.

Q. And at that point of time, what did you do?

A. Well, I immediately reversed my engines full speed and blew him three whistles.

Q. Prior to the time that you reversed your engines, do I understand that you had shut your engines off, however?

A. Yes.

Q. Does that mean you were coasting?

A. Coasting; gliding.

Q. And then when you threw your engines in reverse, the purpose of that was what?

A. To stop my headway, keep from having a collision.

Q. Did you give any further signals after you reversed your engines?

A. Three blasts.

Q. And that meant what? [34]

A. That my engines were going full speed astern.

Q. At the time that you gave those three blasts, do you know about how far apart the vessels were?

A. Well, they were getting pretty close, a little less than a thousand feet, I should judge; it was pretty dark; it is pretty hard to tell.

Q. Now, from the time that you gave your last signals of three blasts of the whistle of the Barry "K", what was the direction of the Barry "K"?

A. Well, I was heading practically into the east shore.

(Testimony of Wm. A. Reed.)

Q. Into the east shore. And what was the direction at that time of the *Pennsylvanian*?

A. Directly straight on my side.

Q. On your starboard side? A. Yes, sir.

Q. Now, just tell the Court the position of the boats when the collision occurred?

A. Well, I was a little bit obliquely to the *Pennsylvanian*, but seeing we was bound to hit I backed around to the starboard so as to square up and instead of driving the barges onto the Barry "K", swept them directly off of the bow; and if I had kept driving the boat, well, it is just a chance that they would have got the steamer instead of the barges and I preferred him to get barges instead of lives. That was my opinion—or sinking the boat.

[35]

Q. At the time that the collision occurred, state whether or not the Barry "K" and barges had come to a stop?

A. I think they had come almost to a complete stop, if not a dead stop.

Q. Now, during the time that the *Pennsylvanian* was approaching you, were you able to make any estimate of her speed?

A. That is pretty hard to do. I don't know just exactly how fast those boats really run or how fast they run.

Q. What was the point on the river where the collision occurred?

A. Opposite Post Office range, I should say,

(Testimony of Wm. A. Reed.)

right opposite the rear light of the Post Office range.

Q. Opposite the rear light of the Post Office range; is that the light to which I now refer?

A. Right.

Q. And on which side of the river?

A. East side of the river.

Q. And how close to the east bank?

A. Approximately 200 feet.

Q. Where would that be with reference to the edge of the channel?

A. Well, it would be along—it is about a thirty-foot channel in there and it jumps very rapidly right at that point.

Q. Now, as I understand your testimony, the Pennsylvanian collided with the starboard side of barge 22?

A. Yes, sir.

Q. And then explain to the Court what happened. [36]

A. Well, it just broke all of the lines that were attached to the Barry "K". Naturally the Barry "K" jumped right back in the river and I stopped and the barges hung for a short duration on the bow of the Pennsylvanian and last, why they just drifted off and went down the river.

Q. And at what point of time were you able to identify the ship which you had had the collision with?

A. Oh, directly after the accident I could see her name on a port bow.

(Testimony of Wm. A. Reed.)

Q. Captain, considering the position of the Barry "K" and the Pennsylvanian at the time that you first observed the Pennsylvanian, were you able to determine the relative distances that the Pennsylvanian traveled down to the point of collision and the distance that you traveled to the same point?

A. It is pretty hard. It is pretty hard to say. I should judge that she was traveling twice as fast as I was.

Q. Now, following the collision where did your boat go? A. After the collision?

Q. Yes.

A. We backed around and went over and tied up to Silo Dolphin.

Q. Which side of the river is that?

A. West side of the river.

Q. What became of your barges?

A. They drifted on down below Post Office Bar, Lower.

Q. That is on the west side? [37]

A. On the west side. The wind carried them down and across. The current carried them down and the wind carried them across.

Q. That is to say, the collision occurred on the east side of the river opposite Post Office Bar, Rear? A. Right.

Q. And when the barges came to a stop following the collision, where do you say they were?

A. They were below Post Office Lower light.

(Testimony of Wm. A. Reed.)

Q. Post Office Lower light? A. Yes, sir.

Q. That is over on the west side, the place to which I am now pointing? A. Yes, sir.

Q. There was no motive power to propel those barges after the collision occurred; is that right?

A. No, sir; that is right.

The Court: We will take fifteen minutes.

(Whereupon at 9:50 a recess was taken.)

(The last question was read by the reporter.)

Mr. Young: Q. By what method were these barges picked up following the accident?

A. The tug Cruiser came in shortly after the accident and asked if there was anything he could do and we told him he could pick the barges up and take them up to Terminal 4.

Q. Did the tug Cruiser pick up the barges? [38]

A. She did.

Q. Where was your boat following the accident?

A. I backed around and went over to the west shore and tied up to what was known as Silo Dolphin.

Q. Why did you do that?

A. There was an oil line broke leading to the burner in the boiler.

Q. And was that repaired while you were over by the Silo Dolphin? A. It was.

Q. What became of the Pennsylvanian?

A. She drifted on down and went out of the mouth of the Willamette the last I seen of her at that time.

(Testimony of Wm. A. Reed.)

Q. Now, following the accident when did you first have an opportunity to observe the lights again on the barges?

A. Well, at Terminal 4 all of the lights were just as we placed them on the barges.

Q. About what time in the night was that?

A. Oh, I should judge along about 3, between 3 and 4 o'clock.

Q. That is, the Cruiser had taken the barges to Terminal No. 4? A. Yes, sir.

Q. And you went there yourself in the Barry "K"? A. Yes, sir, eventually.

Q. And do I understand the lights were burning the same at that time as they had been before the accident? A. They were.

Q. Were they in the same positions on the barges? [39] A. Yes, sir.

Q. As you have already described?

A. Yes, sir.

Q. Captain, will you state whether or not based upon your experience on the night of this accident it was either safe or practicable for you to have operated the Barry "K" with her tow up the right-hand side of that channel past Post Office Bar?

A. No, it was not safe and practicable.

Q. Will you state to the Court why, after you gave your first danger signal to the Pennsylvanian, you did not stop your engines and throw them in reverse immediately?

A. Well, I was giving two whistles first, the

(Testimony of Wm. A. Reed.)

danger whistle, and another two whistles, which I gave several, figuring any moment he would understand the two whistles, he would swing back into his regular course and proceed on down to my star-board side.

Q. Had he done so, would there have been any reason for a collision? A. No, sir.

Q. And proceeding over toward the east side, where were you going with reference to the channel?

A. I was going directly away from the channel, to the east side of the channel.

Q. And in that particular area of the river, could heavy-draft vessels travel?

A. They did right at that place, but not farther where I was [40] trying to get.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. You didn't, however, Captain Reed, get to the place that you aimed to get to, to be safe, did you? A. Yes, I would.

Q. I say you didn't, did you?

A. No, I didn't.

Q. Your object was to get into the shoal water where you would be entirely out of the ships' deep channel, wasn't it? A. Yes, sir.

Q. And you did not succeed in getting there, did you? A. No, sir.

Q. I will stand over here, because I want you

(Testimony of Wm. A. Reed.)

to talk toward the Court. When you gave your two-blast signal, you understood, did you not, that that was only an invitation on your part to the other ship to pass starboard to starboard?

A. Well, I would say a request.

Q. A request, yes. And you know, don't you, that under the rules the other ship doesn't have to accede to that request? A. No, sir.

Q. And you know that unless she does respond to your invitation and accede to your request, you have no right to insist on a starboard to starboard passage, have you? [41] A. Yes, sir.

Q. Is that your understanding of the rules?

A. Yes, sir.

Q. You think that when you request a starboard to starboard passage with two blasts, the other ship must accede to it?

A. Yes, sir. If she doesn't, she can blow me a recall or a danger whistle.

Q. Well, now, in testifying before the United States Inspectors, you admitted, didn't you, that when you gave the two-blast signal for a starboard passage, it was up to you to keep out of the way of the other ship, didn't you? A. Yes, sir.

Q. And you were going to keep out of her way by getting over in the shoal water where she could not reach you? A. Right.

Q. That was your plan? A. Yes, sir.

Q. But you did not succeed in doing that, did you? A. No, sir.

(Testimony of Wm. A. Reed.)

Q. In other words, you did not fulfill the obligation which you had undertaken to keep out of her way, did you?

A. I didn't get it fulfilled.

Q. No. Now, just to review briefly your course and conduct, when you came up the left-hand side and sighted the Pennsylvanian, you blew your two blasts and you got one in response? [42]

A. Yes, sir.

Q. At that time the ships were three to four thousand feet apart, you think?

A. Yes, sir. More—yes, sir; that is right.

Q. You were showing your red light to the Pennsylvanian? A. Yes, sir.

Q. And she was showing her green light to you?

A. Yes, sir.

Q. And when you got an answer of one blast to your two, you recognized at once that that created a situation of some doubt and danger, didn't you?

A. Yes, sir.

Q. What did you do about it?

A. I blew him a danger whistle.

Q. Of four blasts? A. Right.

Q. Now, how soon did you blow that danger whistle after you got his one blast?

A. Well, sufficient time to distinguish it from the danger whistle.

Q. Well, could you be more exact than that?

A. I couldn't say in seconds, no; eight or ten seconds.

(Testimony of Wm. A. Reed.)

Q. And did I understand you to say you thought the ships had cut down the distance between them at that time by about a thousand feet?

A. Yes, sir. [43]

Q. So that at the time you blew your first danger blast, the ships were from two to three thousand feet apart?

A. Approximate; around there.

Q. And the Pennsylvanian following the channel was swinging all the time a little bit to her starboard, making her more end-on with you, was she?

A. Yes, sir.

Q. In other words, she was continuing to swing into that part of the river which you had requested by your two blasts?

A. Yes, sir.

Q. In other words, the situation as it appeared to you was continuing to get more dangerous?

A. Yes, sir.

Q. But you did not at that time stop your engines, did you?

A. Not at that moment.

Q. No. You continued at full speed ahead?

A. Yes, sir.

Q. Did you not?

A. Yes, sir.

Q. Then you blew a second two blasts, didn't you?

A. Yes, sir.

Q. Still insisting on what we will call your request to pass starboard to starboard?

A. Yes, sir.

Q. And still you kept full speed ahead? [44]

(Testimony of Wm. A. Reed.)

A. Yes, sir.

Q. And I think you said you got no response from the *Pennsylvanian*? A. Right.

Q. And you continued full speed ahead until you blew a third two blasts, didn't you?

A. Yes, sir.

Q. How far apart do you think the vessels were when you blew the third two blasts?

A. Oh, a thousand feet or a little better.

Q. Then the vessels had narrowed the distance between them from the first whistles to your third two blasts—they had narrowed the distance by two or three thousand feet, hadn't they?

A. Yes, sir.

Q. And still you went full speed ahead up to that time? A. Up to that time.

Q. And heading, as I believe you said, more—trying to reach the shoal water? A. Right.

Q. On the east bank? A. Yes, sir.

Q. Now, why did you persist in that course and in that full-speed-ahead action through such a long time when you realized there was danger?

A. Well, he was coming directly head-on, kept coming, and I [45] thought any moment he would hear my two whistles and pull back into his regular course at that point.

Q. But he had indicated to you that he wanted to obey the rule and take the right-hand side; he had indicated that by the one whistle, had he not?

A. Yes, but no other indications.

(Testimony of Wm. A. Reed.)

Q. Well, he had never indicated a contrary indication, had he? A. No.

Q. Well, by what process of reasoning did you think he would swing a heavy ocean-going ship to that ship's port contrary to the course he had indicated?

A. Because he was clear out of the regular course which ships go at that point—travel at that point.

Q. He was right in the regular course required by Article XXV, wasn't he?

A. What article?

Q. Do you know Article XXV of the Inland Rules; it is called the "Narrow Channel Rule"?

A. Oh, yes.

Q. What does it say?

A. It says, "Keep that far to the channel that lies to your starboard."

Q. Yes. That is what the Pennsylvanian was doing, was it not? A. Yes.

Q. And under the rule that is what he had to do, wasn't it? [46] A. Yes.

Q. Well, if under the rule that is what he had to do, why did you think he was going to depart from the rule?

A. Because it is not safe and practical for a tow boat to go up on the west side of the channel at that point.

Q. Well, Captain Reed, if it was safe and practicable for the Pennsylvanian to keep to her own

(Testimony of Wm. A. Reed.)

starboard side of the channel, she had to do it, didn't she?

A. If it was safe and practical, yes.

Q. I will ask you this: It was perfectly safe and practicable for the *Pennsylvanian* to keep to her starboard side, wasn't it? A. Yes.

Q. And the rule says when it is safe and practicable to do so, a ship shall keep to her own starboard side, doesn't it? A. Yes.

Q. It was mandatory on her to keep to her starboard side, wasn't it? A. Yes.

Q. She had to do it, didn't she?

A. No, she didn't have to do it.

Q. I don't want to use words that confuse you; you evidently don't understand what "mandatory" means. Wasn't the *Pennsylvanian* obliged under the rule to keep to her own right?

A. According to rules, yes.

Q. But according to custom, not?

A. No. [47]

Q. That is what you mean, do you?

A. That is right.

Q. Did you say that you had been navigating the river here for twenty-two or twenty-three years?

A. Yes, sir.

Q. As a pilot?

A. Pilot and Master.

Q. Pilot and Master. And you have not merely held license that long, but you have actually been a pilot and Master for that long?

(Testimony of Wm. A. Reed.)

A. Yes, sir.

Q. Operating river and steam boats?

A. Yes, sir.

Q. You have never acted as pilot on ocean-going ships, have you? A. No, sir.

Q. You are purely a tow boat man?

A. Yes, sir.

Q. Now, do you know the history of this Post Office Bar channel; do you know how wide it used to be?

A. I know it used to be very narrow.

Q. Very narrow? A. Yes, sir.

Q. Do you know that in the old days—I will say twenty years ago—when the Post Office Bar ship channel was only about 250 to 300 feet wide? [48]

A. I presume that is right.

Q. Well, you know that as a fact, don't you?

A. Well, I never noticed charts at that time, though. I never studied the charts.

Q. And do you know that even in those days when it was only 250 to 300 feet wide, that large ocean-going steamships always passed there, when meeting port to port?

A. I presume they did.

Q. You don't know that?

A. No. I was not on this upper river at that time.

Q. When did you begin to navigate the upper river?

A. Along about '20—from '20 to '22.

(Testimony of Wm. A. Reed.)

Q. Well, from your navigation date when you commenced to navigate the upper river, you know that ocean-going, big steamers always pass in this vicinity port to port, don't you? A. Yes, sir.

Q. They obey the rule, don't they?

A. Yes, sir.

Q. And they have been doing that for the last twenty years? A. Yes, sir.

Q. That you know of? A. Right.

Q. Do you know that that channel at that point has been further widened in the last two years until now it is 800 feet wide clear across, 30 feet of water? [49]

A. No, I didn't know it was 800 feet.

Q. You didn't know that? A. No, sir.

Q. How wide did you suppose it was?

A. 700 feet.

Q. Well, that is not a great difference. You admit it is 700 feet? A. Yes.

Q. But you didn't know it was 800 feet wide?

A. No, sir.

Q. Is it more convenient and easier for the tugs and tows to come up on the east side of the river?

A. Yes, sir.

Q. It is slacker water there, isn't it?

A. When there is a winter freshet, there is slacker water there, yes.

Q. Well, at this time in February, when you had this collision, was it slacker water over there?

A. Well, there was very little difference.

(Testimony of Wm. A. Reed.)

Q. Very little difference. How shoal is the water over there outside of the 30-foot channel?

A. Oh, it jumps up to 21, 12, and up, I judge, right up to nothing.

Q. And how wide is the space between the 30-foot contour and the river bank on that side? [50]

A. Oh, two or three hundred feet.

Q. That is the water you were trying to get into but did not get into, is it? A. Yes, sir.

Q. And you say that on this night the water over there was not any slacker than it was in the main ship channel? A. Not much difference.

Q. Well, then at least there wasn't much current; is that what— A. That is right.

Q. How much current would you say there was?

A. I wouldn't say there was much over a mile; right around there somewheres close.

Q. By that you mean a mile an hour?

A. Yes.

Q. And was that current downstream?

A. It was.

Q. What? A. It was.

Q. Is it easier to control a ship, a tow boat, when you are stemming the current than when you are going with it? A. Yes, sir.

Q. Why is that?

A. Well, you are working against the current; you can hold her better with your rudder.

Q. The current gives you better steerageway when it is against you, [51] doesn't it?

(Testimony of Wm. A. Reed.)

A. Yes, sir.

Q. And gives you better control of your vessel?

A. Yes, sir.

Q. So that such advantage as there may have been in this current was with you rather than with the Pennsylvanian, wasn't it?

A. Yes, sir.

Q. You have said that the easterly breeze, which you contend was a handicap to you, was blowing from the east, you think, ten or fifteen miles an hour?

A. Around that; it is pretty hard to judge.

Q. I know it is and I was wondering what means you had, if any, of estimating that?

A. Well, the bearing on my tow, the way she was sliding.

Q. When did you notice her begin to slide?

A. Coming into the mouth of the Willamette.

Q. Is that the only way you had of estimating the force of the wind? A. Yes.

Q. How high are those willows on the bank that you say gave you some protection from the wind?

A. Oh, they would run up there twenty feet probably in some places.

Q. You mean the willows themselves?

A. That is the general height of the willows and cottonwoods above [52] the water.

Q. Above the water? A. Above the water.

Q. Do you remember testifying before the Inspectors that they are about six or eight feet high? A. Above the dike.

(Testimony of Wm. A. Reed.)

Q. That is what you meant? A. Yes.

Q. But perhaps twenty feet above the water?

A. Yes, around there.

Q. How far away from those willows were you?

A. Oh, I was three or four hundred feet—
three hundred feet.

Q. And if you had been over in your own right-hand side of the channel, how far would you have been from them?

A. Well, I would have been about a thousand to twelve hundred and thirteen hundred feet.

Q. Do you think that would make much difference in the protection they would give you?

A. Absolutely.

Q. Is your Barry "K" a boat of good power?

A. Yes, sir.

Q. Do you know what horsepower she has?

A. Right close to 500 horse; approximately right around there.

Q. She is a good strong tug, is she?

A. A good tug, yes. [53]

Q. Isn't she or is she a little better than most of them on the river?

A. I wouldn't say most of them, no; about average.

Q. She is perfectly capable of handling her tows in any ordinary circumstances, is she?

A. Yes, sir.

Q. What? A. Yes, sir.

Q. You said that in order to go up the right-

(Testimony of Wm. A. Reed.)

hand side of the river there under the conditions prevailing that night you would have had to have the bow of your foremost barge about 200 feet out into the channel, didn't you? A. Yes, sir.

Q. And you said in that position she would be safe, didn't you? A. Yes.

Q. Now, how much distance would that have left between the stern of your Barry "K" and the dike on your right-hand side?

A. Well, that would have left her a safe distance; forty or fifty feet with the wind blowing.

Q. So that if you had elected to come up on that side, keeping the stern of your boat 30 or 40 feet away from the dike and your bow 200 feet out in the channel, you would have been safe in doing that? A. Yes, sir.

Q. With a tug of your power and that tug, wouldn't you? [54] A. Yes, sir.

Q. Would you mind speaking a little louder? I am not very acute of hearing myself, and I want us all to hear this.

Mr. Young: If the Court please, I might suggest both counsel and witness speak louder.

Mr. Wood: I would be glad to. Sometimes I have been accused of shouting at a witness and I don't want that accusation made of me.

Mr. Young: As long as you are reasonable about it we won't make the accusation.

Mr. Wood: Q. Captain Reed, if, then, you had been in that position, there would still have been

(Testimony of Wm. A. Reed.)

600 feet of deep water for the Pennsylvanian to come down in, would there not? A. Yes, sir.

Q. How close do you have to be with your tug and tows to a passing steamer to feel any effect of her displacement wave as she goes by?

A. Her displacement wave?

Q. Yes.

A. God, you can be sometimes a half or three-quarters of a mile away from her and still feel it.

Q. You can? A. Yes.

Q. Well, that depends, of course, I suppose, on the size of the steamer and how much water she is drawing and her speed, doesn't [55] it?

A. Yes, sir.

Q. Is it the custom for most of these steamers to slow down if they are passing you in such a way as not to throw any displacement wave that is injurious?

A. I don't know whether it is a custom or not. Some do and some don't.

Q. Do you know what the practice of the American-Hawaiian steamers is in that regard?

A. I know what they have done in regards to that.

Q. You don't know what their practice is?

A. No, sir.

Q. You also spoke of the kick water from the steamer's propeller? A. Yes, sir.

Q. Having some influence on your boat if you passed on the starboard side? A. Yes, sir.

(Testimony of Wm. A. Reed.)

Q. Now, the kick water from the propeller means the water that the propeller throws directly back of it as it drives the ship ahead through the water, doesn't it? A. Right.

Q. And if the vessel is going straight ahead that kick water is directly astern, is it not?

A. It is.

Q. So that if you passed a steamer on parallel courses, you [56] wouldn't feel the kick water, would you? A. No.

Q. Now, furthermore, the direction of the kick water from the steamer's stern is influenced by the position of the ship's rudder, is it not?

A. Yes, sir.

Q. In other words——

A. To some extent.

Q. Well, to a considerable extent, is it not?

A. It is considerable.

Q. Yes. Now, if the rudder is put to the right, it deflects the kick water off in the right-hand direction, does it not?

A. Somewhat, yes.

Q. Therefore, the Pennsylvanian coming down this channel and putting her rudder to the right, as she would have to do to make the turn here, she would deflect her kick water away from you if you had been coming up on the right-hand side, would she not?

A. She would deflect about half of it.

Q. How close do you have to be to a ship to get the kick water?

(Testimony of Wm. A. Reed.)

A. At that position you would be close enough to feel it.

Q. I asked you how close?

A. Oh, 100 or 150 feet.

Q. You think you could detect it then?

A. Yes, sir, I believe I could.

Q. Do you mean that even though the ship had her rudder to the [57] right, you would feel it?

A. Yes, sir.

Q. How could you?

A. Well, the rudder only deflects about half of her kick water.

Q. But the other half is going directly astern, isn't it?

A. Yes, directly astern; she is on the swing there all the time.

Q. An easy swing, is it not?

A. Yes, an easy swing.

Q. Now, would you mind at my request making a few marks on this chart showing where these different things occurred? Just one little cross mark where you were when you first sighted the Pennsylvanian.

A. Approximately right there.

Mr. Wood: May I mark that, counsel, "Barry 'K' at first sight"?

Mr. Young: That is okey.

Mr. Wood: According to Reed.

Mr. Young: Yes.

Mr. Wood: "Barry 'K', Reed, first sight."

(Testimony of Wm. A. Reed.)

Mr. Young: Satisfactory.

Mr. Wood: Q. Now, Mr. Reed, would you mark where you think the Pennsylvanian was at the same time?

A. This is approximate.

Q. Would it help you, Captain Reed—just a moment. Would it help you to extend that Post Office Bar range here on this chart?

A. I will make it just approximate— [58]

Mr. Young: I would suggest that that be done, because this particular diagram does not show the actual range itself, though it does show the position of the—

Mr. Wood: If everybody wants it done, I will.

Mr. Young: I think so, please.

The Witness: It would be a help all right.

Mr. Wood: I have drawn the range and marked it "P. O. Range."

Q. Now, Captain Reed, will you mark, please, where you think the Pennsylvanian was at the first sight?

A. Approximately as near as I can tell, she was right about in here.

Q. Make a little mark, on the range.

A. Yes, sir.

Mr. Wood: I have marked that "Pennsylvanian, Reed, first sight."

Q. Now, would you mark where you think the collision occurred?

A. Right around in here. It may vary a little bit this way.

(Testimony of Wm. A. Reed.)

Q. That is as close as you can put it, is it?

A. Yes.

Mr. Wood: I have marked that "Collision, Reed."

A. (Continuing): A little bit more this way.

Mr. Wood: Q. Would you like to change it?

A. No.

Q. Now, Captain Reed, would you mark, please, the position where the barge had drifted to after the collision—I will ask you [59] further, did they all drift together or separated?

A. No, they were separated.

Q. You spoke of one, I believe, having drifted downstream and across——

A. They both drifted down practically together, a short distance of each other.

Q. Were they torn apart? A. Yes.

Q. So their lines didn't hold them together?

A. Oh, no.

Q. Well, were they so close together that you could mark them with one mark on the chart where they were? A. Well, when?

Q. When they drifted.

A. When she was picked up?

Q. At this place you said they drifted to.

A. Approximate—I wasn't down there at the time of drifting—but where I could see from where I was, right down along this dike, somewhere below Post Office Lower.

Q. That is as near as you can mark the position

(Testimony of Wm. A. Reed.)

of the barges when they reached the end of their drift? A. Yes.

Mr. Wood: I have written there, "Barges at end of their drift after collision, Reed."

Q. I will ask you to make one more mark on there for me, [60] Captain Reed. Just mark up there the direction of the wind?

A. The wind was blowing from?

Q. Yes, wind direction; make a line and put an arrow on one end of it.

(The witness made a mark on the exhibit.)

Mr. Wood: I have marked that "Wind direction, Reed."

Q. Substantially from the east, it was?

A. Yes, an easterly wind.

Q. Were the barges damaged any by coming up against this dike after they had drifted there?

A. No, not that I know of.

Q. But this position that you have marked here, were they resting against the dike?

A. I don't know. I couldn't say.

Q. You didn't pick them up?

A. No, I didn't pick them up.

Q. Would that be the natural place for them to come up against? A. Yes.

Q. How far down the river does that dike extend? I don't like to recall you from the stand again.

A. That dike will extend down very closely to what is known as Gillihan's light.

(Testimony of Wm. A. Reed.)

Q. Away down here?

A. Yes. Originally it went right on through.

Q. Is the dike marked on this engineer's chart? Let's look at [61] the legend. I don't see that it is marked.

A. It is a broken dike; it is broken up here again. I think right about right in there is where the end of that dike comes, and around close to Gillihan's light.

Q. I think you said in your testimony that the barges at the end of their drift were tied up at the Silo Dolphin? A. No, I did not.

Q. What did you say about that?

A. I tied up there after the collision.

Q. Oh, you tied up there. Is that dike that you speak of one that has been put there by the United States Engineers? A. Yes, sir.

Q. And they are in charge of the navigation of the river, are they not?

A. I presume they are.

Q. Well, you know they are?

A. Yes, I know they are.

Q. You know they are in charge of river and harbor improvements? A. Yes, sir.

Q. And you don't suggest, do you, that the United States Engineers would put a dike there that would be a hazard to navigation? A. No.

Q. That dike is not in any way a hazard to navigation, is it? A. Some navigation, yes.

Q. Well, then, to come back to what I asked you

(Testimony of Wm. A. Reed.)

before, do you [62] think that the United States engineers, the officers in charge of the river and harbor improvements, would build a dike that is a hazard to navigation?

Mr. Young: Just a moment, if the Court please. I object to that question upon the ground that counsel is asking this witness to state what the opinion of the United States engineers might be; it is an entirely irrelevant matter.

Mr. Wood: I think it tests his experience as a pilot, his knowledge of navigation and all those things.

The Court: He may answer it. Tell all you know about the dike.

A. Yes, they do put dikes in this river that is a menace to river navigation, that is, tow boats, log boats, and barges.

Mr. Wood: Q. That answer of yours suggests my asking you this: Is there some feeling here on the river between the tow boats and the ocean steamers? A. No.

Q. I would like to ask you about these lights, these lanterns you had on there. A. Yes, sir.

Q. Are you familiar with the steamboat inspectors' regulations about lights on barges and scows?

A. Yes.

Q. Well, do you say that these barges or scows, whichever you call them, were lighted in accordance with the regulations? [63] A. Yes.

(Testimony of Wm. A. Reed.)

Q. I will show you, Captain Reed, Libellant's Exhibit 7; that is a photograph of your boat and barges as they were made up on the night of the collision, isn't it? A. Yes, sir.

Q. Will you make little cross marks on that photograph in pen and ink? I think that will mark best on the photograph. Just make little crosses showing whereabouts on the barges these coal oil lanterns were placed. (The witness marked on the exhibit.) It is true, isn't it, that coal oil lanterns smoke up quite easily? A. Oh, yes.

Q. Their wicks have to be trimmed properly to avoid smudging the glass? A. Yes, sir.

Q. And any carelessness in that regard will dim the light, won't it? A. Right.

Q. Do you want the Court to believe that this lantern which has been put in evidence here as an exhibit is a true sample of the lights that were on those barges that night? A. Yes, sir.

Q. And that they were as clean as this glass is?

A. Yes, sir.

Q. When did you last see them?

A. I last seen them when we took ahoid of the barges at Terminal 4. [64]

Q. After the collision?

A. After the collision.

Q. And you say they were not smudged or smoky at that time?

A. They were not smudged or smoky.

Q. How long had they been burning?

(Testimony of Wm. A. Reed.)

A. Well, they were put on there, I presume, along about 10:30—10 or 10:30 the night of January 31 and that was February 1 about 4 or 5 A. M., along in there.

Q. What was the name of the man whose duty it was to attend them? A. John Kelly.

Q. Is he what you call your watchman?

A. Yes.

Q. Is he the man that was in the pilot house with you just before the collision?

A. Yes, sir.

Q. I don't remember whether you testified to it here in the courtroom or whether I am remembering some testimony before the Inspectors, but did you say you were on your way to the Weidler dock? A. That was our destination, yes.

Q. And the Weidler dock is on the west side of the Willamette River? A. Yes, sir.

Q. Below the Broadway Bridge?

A. Yes, sir. [65]

Q. You were going to pick up another barge at the West Oregon mill on your way up the river, weren't you? A. Yes, sir.

Q. What kind of a barge was that?

A. A barge load of hog fuel.

Q. A barge load of hog fuel? A. Right.

Q. Is that similar in size and type to these barges?

A. Practically the same dimensions, only she has a bin on her instead of a house.

(Testimony of Wm. A. Reed.)

Q. Well, was she loaded with sawdust?

A. Oh, yes.

Q. Would that bin and pile of sawdust be approximately as high or higher than the houses on these barges here?

A. Higher than the houses on the barges.

Q. How much higher?

A. Oh, six to ten feet.

Q. Six to ten feet higher. And where were you going to lash that barge?

A. I was going to take it right on the star-board side of barge 22.

Q. And where were you going to deliver that barge?

A. Eventually it would have went to West Linn.

Q. Where is that? A. Oregon City.

Q. Would you have taken it up there? [66]

A. I presume I would, if I had been on the boat.

Q. Do you often take loaded barges with the "Barry K" up to Oregon City?

A. Yes, sir.

Q. What are they loaded with, sawdust?

A. Yes, sir.

Q. How many do you take on one load?

A. One barge.

Q. One barge?

A. Yes, sir. And an empty paper barge.

Q. You mean you take two barges up?

A. Oh, yes.

(Testimony of Wm. A. Reed.)

Q. Three?

A. I have, with the Robert Young.

Q. With what? A. The Robert Young.

Q. Is that a more powerful boat than this?

A. No.

Q. Not so powerful? A. No.

Q. Now, in taking two or three barges up through the harbor here, you of course have to go through all of the bridges, don't you?

A. Yes, sir.

Q. And how wide is the side of the draw span through which you go? [67]

A. How wide is the draw span?

Q. Yes.

A. Oh, about a hundred feet would be the narrowest one.

Q. Which one is that? A. Morrison.

Q. And when you go up through the harbor here, do you keep to the right-hand side?

A. Yes, sir.

Q. You obey the narrow channel rule, do you, coming through Portland here? A. Yes, sir.

Q. Do you do that all the way up to Oregon City? A. No, sir.

Q. You don't, however, meet any steamers after you get above Portland, do you?

A. I have, yes.

Q. Ocean steamers?

A. Not ocean, no, sir.

Q. That is what I meant. Are there any bends

(Testimony of Wm. A. Reed.)

in the Willamette River that you have to make going through Portland here? A. Yes, sir.

Q. Where are they?

A. It bends practically all the time; the Steel Bridge, the Burnside, back to the Morrison and over to Hawthorne, right and left bends. [68]

Q. How? A. Right and left bends.

Q. How do they compare in degrees of curvature with this curve here at Post Office Bar?

A. Some of them are a little bit more; some of them are not quite so much.

Q. Nevertheless, you bring your barges up, keeping on the right-hand side, don't you?

A. Yes, sir.

Q. You testified that at the time of the collision the "Barry K" and her barges were almost, if not quite, stopped? A. Yes, sir.

Q. And how far had she run in distance from the time you stopped going full speed ahead and reversed your engines, to the collision? In other words, I want to know how long it took you to reverse.

A. Oh, I don't know. Three-quarters to a minute.

Q. I didn't ask you the question right. I meant in distance.

A. It is pretty hard to say; a little over the length of the "Barry K" and the barges.

Q. That would be about 300 feet?

A. A couple or three hundred feet.

(Testimony of Wm. A. Reed.)

Q. You mean that you feel that going at six miles an hour your tug was capable of bringing her practically to a standstill in 300 feet? [69]

A. Right close to it.

Q. You are not now employed by the Western Transportation Company, are you?

A. Yes, sir.

Q. I thought you were employed by the Knapp-ton Towboat Company.

A. I was for a short duration.

Q. But you are now re-employed by the Western Transportation? A. Yes, sir.

Q. Well, when you were employed by the Knappton Towboat Company, I just wondered whether they gave you any instructions about passing ships in the Post Office Bar channel?

A. No, sir.

Q. Do you know that the Knappton tugs with tows coming up that channel—I don't know whether they always do, but I know on occasion they pass to the right—pass steamers port to port; do you know that?

Mr. Young: I object to counsel testifying. He has stated for the record what he knows to be the fact. I object to that question.

Mr. Wood: I will take that back. We can prove that with a witness.

Mr. Young: I presume the Court will eradicate from its mind the statement so made by counsel?

Mr. Wood: Q. Do you know, Captain Reed,

(Testimony of Wm. A. Reed.)

that the Knappton tow boats with tows have at least since this collision been passing steamers there on Post Office Bar port to port? [70]

A. No, sir, I do not know it.

Q. Have you ever been going down the river with your tow boat and a tow and met tow boats coming up?

A. Yes, sir.

Q. At this place?

A. Yes, sir.

Q. And if tow boats with tows alongside met at this place in Post Office Bar, how do they pass?

A. Why, they pass either side; sometimes port to port, sometimes starboard to starboard; it all depends on the position of the heaviest boat.

Q. But if a tow boat coming up, as you were, meets another tow boat coming down, each with tows, they generally pass there port to port, don't they?

A. Not generally, no.

Q. Well, give us an idea of what proportion of the time they pass one way and what proportion the other.

A. I would say it is as liable to be one way as the other.

Q. About half and half?

A. That is what I would say.

Q. But they don't pass starboard to starboard there, unless they agree on it, do they?

A. No, sir.

Mr. Wood: If the Court will let me consult my advisors.

Q. It is just suggested that I ask you about

(Testimony of Wm. A. Reed.)

that forward range [71] light of yours, Captain. You have already testified that it was out because it wouldn't show with the barge ahead of it?

A. Yes, sir.

Q. In other words, that forward range light is supposed to be lit and on the bow of the "Barry K", is it not? A. Yes.

Q. Do the regulations require that?

A. Yes, sir.

Q. But you did not have it lit?

A. No, sir.

Q. For the reasons you have explained?

A. Yes, sir.

Q. What is the purpose of that range light?

A. To show the fore part of your vessel.

Q. Is it also to show an approaching ship the angle at which your vessel was lying—

A. It would be very hard to on some boats. No; I would say no.

Q. That is its object, isn't it?

A. No, I don't think so.

Q. Aren't the range lights of a boat supposed to enable the other ship by lining them up or observing how open they are to tell the angle of approach of the other ship?

A. I wouldn't say so.

Mr. Wood: That is all.

(Testimony of Wm. A. Reed.)

Redirect Examination [72]

By Mr. Young:

Q. Captain, counsel inquired of you as to whether or not in going up through the Portland harbor with your tow boat you keep to the right-hand side of the channel. I will ask you whether or not in the event you are coming up through the Portland harbor and you are meeting a large ocean-going vessel, the practice may vary from time to time with the ship itself as to which side you pass on?

Mr. Wood: Now, I object to counsel testifying.

Mr. Young: I have asked it whether or not question form, your Honor.

The Court: He may answer.

Mr. Young: Q. Did you get the question, Captain Reed?

A. Well, what you want to know, if it is uniform?

Q. Yes. A. No, it is not.

Q. Now, will you explain your answer.

A. Because a ship will probably be coming out of the dock approaching, say, a ship leaving Terminal 1, which is on the west shore below the Broadway Bridge; she would be approaching upstream, she wouldn't be directly in the middle of the river, and say there was a tow boat coming down over through the steel bridge and she wanted to go into the Weidler Dock, which the ship would

(Testimony of Wm. A. Reed.)

probably be in the Broadway Bridge at the time she would be passing, she would make a starboard passage. Also I would say the Morrison Street [73] Bridge it is customary for ships to come down to the west side, use the west side of that bridge altogether.

Q. You mean through the west side of the draw?

A. The west side of the draw, yes.

Q. Suppose that a tow boat is going upstream and an ocean steamer coming downstream, what is the practice then?

A. That is what I was trying to illustrate, the ocean steamer coming down and a tow boat going up and naturally instead of waiting till that ship got through so she could pass port to port, why she would go up on the east side of the bridge, making a starboard passing to that ship.

Q. You say she would go up the east side?

A. The tow boat would be, being the ship coming down on the west side of the draw.

Q. Captain, with respect to this custom to which you have testified in and about Post Office Bar of river boats going up on the left-hand side of the channel, through what distance does that custom obtain?

A. Well, I should say from Post Office entrance light practically up to abreast of the Willamette or Multnomah channel.

Q. And then as the river boat gets upstream

(Testimony of Wm. A. Reed.)

beyond the Multnomah channel, what does the river boat then do?

A. Well, she will proceed right on up the east shore, provided she didn't go to West Oregon mill and pick up a barge, which I did in this case. [74]

Q. Now, counsel has drawn on the engineer's map an extension of the Post Office range course. Will you tell the Court in the case of a ship, an ocean-going ship proceeding down the Willamette and following the Post Office range, how far does that ship ordinarily proceed over to the west shore before it leaves the range to continue on downstream?

Q. Well, I am not a ship pilot, don't know really where they start to swinging off, but occasionally they are in within 300 feet, I would say, abreast of the rear light of the Post Office range by the time they get down there.

Q. Now, in the case of the steamer Pennsylvanian, how far would you say the Pennsylvanian proceeded toward the west shore of the Willamette River along Post Office range before she veered off to starboard?

Mr. Wood: Pardon me. I am going to object to that question, your Honor, because I think the witness has already testified—I think I am right in this—that he didn't know that.

The Court: Well, we will see. He may answer it.

A. Well, it is pretty hard to tell up there at

(Testimony of Wm. A. Reed.)

the distance where she was at, but she was coming down on the range; I could see that, and where she started to swing was shortly after I——

The Court: Q. Anyhow your position is you expected her to stay on the range longer than she did? A. Yes, absolutely.

Mr. Young: Q. Would it be possible for you on this diagram [75] to indicate approximately the place where the Pennsylvanian left the range?

The Court: He says he doesn't know.

A. It is pretty hard.

Mr. Young: Q. Very well. Counsel asked you whether or not ocean-going ships in meeting river tow boats as a matter of practice slow down and he asked you that practice with respect to the American-Hawaiian ships and in giving your answer I think you said you did not know the practice but you said that you know what they have done.

The Court: We are not interested in that, because he didn't know whose ship this was until after the time of the collision.

Mr. Young: If the Court please, it might have been the American-Hawaiian so far as he did know it.

The Court: I think that is going too far afield.

Mr. Young: Now, counsel——

The Court: I got the impression he was going to say something uncomplimentary to them.

Mr. Young: Something uncomplimentary to the American-Hawaiian ships? I don't know what he was going to say, I am sure.

(Testimony of Wm. A. Reed.)

The Court: I think you have a pretty good idea.

Mr. Young: Perhaps they have something uncomplimentary coming to them; I don't know. They may not.

Q. Now, do you know what the approximate length of the *Pennsylvanian* was?

A. No, I really don't know. She is better than 300 feet; I [76] know that.

Q. Yes. A. I couldn't say.

Q. Does the length of the ocean——

Mr. Wood: Excuse me a moment, counsel. If it will assist you any, I think the *Pennsylvanian* was 407 feet long.

Mr. Vaux: 430 over-all.

Mr. Young: Q. Counsel has just stated that the *Pennsylvanian* is 430 over-all. Now, Captain, in determining the amount of clearance which is safe between the river boat going upstream and passing the ocean-going ship and the ocean-going ship going downstream, does the length of the ocean-going ship enter into the figure? A. Why, yes.

Q. And why?

A. Well, a longer boat would take a slower bend; you would have to give her more rudder to make her swing faster; a shorter boat would swing a whole lot faster.

Q. If the ocean-going boat is longer, does that increase the distance which you need to allow between the passing ships?

A. Well, I really don't know about an ocean

(Testimony of Wm. A. Reed.)

boat. I really couldn't say that, because I have had nothing to do with them.

Q. In response to a question put by counsel, you testified that the Pennsylvanian in coming downstream could safely keep to its starboard side. However, was that true of the Barry "K"; would [77] it be safe for it to keep to its starboard side in going upstream? A. No.

Q. Were you able to determine whether or not the Pennsylvanian ran aground at all before the collision? A. No, I couldn't determine.

Q. Do you know what the nature of the bottom of the river is on the east side, of what material it is made?

A. Well, it is sand and clay, a little clay in some spots, mostly sand. I think it is clay bank.

Q. Counsel, in quoting your words, referred to the Barry "K" as proceeding full speed ahead before the collision. When you state full speed ahead in miles per hour, what did you mean?

A. Miles per hour? About six miles.

Q. About six miles?

A. With the tow that she had.

The Court: I will tell you something, Mr. Wood, from long experience; that is the hottest place in the courtroom against that wall.

Mr. Wood: I am usually in the hottest spot when Mr. Young is against me.

Mr. Young: Thank you. You will notice I took my coat off before you took off yours, though.

(Testimony of Wm. A. Reed.)

Q. Counsel, in cross examining you, inquired as to whether the Pennsylvanian was required to keep on her right-hand side coming [78] down the stream. To what extent would that depend upon whether anybody else happened to be occupying the right-hand side?

A. Well, I don't quite get your question.

(The last question was read by the reporter.)

A. (Continuing): Well, if anybody else would be occupying that right-hand side, such as log boats, which I have seen, it would be impossible for them to go down without having an accident with some other vessel.

Q. Counsel further brought out from you on cross examination that some twenty years ago when the channel was narrower than it now is that ocean-going ships then passed port to port in the vicinity of Post Office Bar. What is the fact as to whether ocean-going ships today pass port to port at that place? A. They do.

Q. And the custom to which you refer is related to what types of ships then, the custom with regard to it being safe or practicable to use the west side of the channel?

A. Ocean vessels, I would say; it would be safer than it would for the river vessels. Is that the question?

Q. The practice as to using the left-hand side going up rather than the right-hand side is confined to the river boats; is that right?

(Testimony of Wm. A. Reed.)

A. Yes, that is right.

Mr. Young: That is all.

Recross Examination

[79]

By Mr. Wood:

Q. Captain Reed, I hope you are not getting tired. A. I am getting hot.

Q. I only want to ask you, I think, one question. You said just now that you expected the Pennsylvanian to stay on the range longer than she did? A. Yes.

Q. How long after you first saw her did you blow her this whistle?

A. Oh, it wasn't very long. I had a hard left rudder and Mr. Kelly had went down to see if the deckhands was up. I should judge a couple of minutes anyway.

Q. Well, was her position—I realize at once that you three or four thousand feet away can't determine her position exactly.

A. No, I wouldn't determine it exactly.

Q. But was her position as near as you can tell substantially different when you blew the whistle than it was when you marked her as "first sight"?

A. It was practically the same when I blew the whistle as when I first saw her. She was taking the same course.

Q. Then she answered that first signal of yours at once with a single blast, didn't she?

A. Yes.

(Testimony of Wm. A. Reed.)

Q. As soon as you got a single blast from her, you knew, you must have known, didn't you, that she was not going to continue on the range but was going to swing over to her right? [80]

A. Well, she might have been wanting me to keep clear on over to the right, which I wasn't in no position to get at.

Q. But, now listen, you testified that she held onto the range longer than you expected she would.

A. No, not held onto it. I said that she turned off the range quicker than I suspected her to.

Q. Excuse me; yes. Well, as soon as she blew you the one blast, you knew she was going to turn off the range, didn't you? A. No.

Q. You didn't? A. No.

Q. Wouldn't that be her duty, to get over to her right-hand side?

A. It would be to get over to the right-hand side, but if she had held her natural course she would have wanted a port passing, which I would have had to cross to ship channel to do.

Mr. Wood: All right; that is all.

Mr. Young: That is all, Captain.

The Court: Q. Captain, before you leave, were you a witness in another proceeding before me?

A. No, sir.

The Court: Step down.

A. (Continuing): Wait; I don't know. Was it S. P. & S.-Knappton Towboat Company?

The Court: No.

(Witness excused.) [81]

E. P. WILLIAMS,

produced as a witness in behalf of the Libelant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Where do you live, please?

A. In Portland.

Q. And how long have you lived here?

A. I have lived at Portland only about——

The Court: Try to finish direct or cross before
noon.

A. ——two months. In and near Portland for
thirty years.

Mr. Young: Q. What is your occupation?

A. Ship pilot.

Q. Ship pilot?

A. Ship pilot; yes, sir.

Q. And are you in the employ of anyone at the
present time? A. No, sir.

Q. In what field are you working at the present
time? A. As a ship pilot.

Q. When you say “ship pilot,” what kind of
ship do you mean? A. Ocean-going.

Q. Ocean-going? A. Ocean-going, yes.

Q. And throughout what territory do you op-
erate? A. Portland, Astoria, Vancouver.

Q. What license do you carry? [82]

A. Master and pilot, any tonnage.

Q. And how long have you had that license?

A. I have had that license about six years.

(Testimony of E. P. Williams.)

Q. And how long have you been licensed as a master and pilot?

A. About thirty-three years, on river steamers.

Q. And during that time has your experience involved the Willamette and Columbia rivers?

A. Yes, sir.

Q. Have you operated both ocean-going ships and river boats? A. Yes, sir.

Q. To what extent have you had occasion to operate river boats?

A. Oh, about—most of my experience has been on river boats about thirty-three years.

Q. Captain, were you on board the Barry K at the time of the collision with the Pennsylvanian?

A. Yes, sir.

Q. What was your position on the ship?

A. Master.

Q. How long had you held that position?

A. On the Barry K?

Q. On the Barry K.

A. I don't just remember. I think a couple of months; something like that.

Q. Prior to that time where had you been?

A. On the steamer Claire. [83]

Q. Were you the Master of the Claire?

A. Yes, sir.

Q. How did you happen to make the change from the Claire to the Barry K?

A. The Claire was tied up for repairs.

Q. And how did it happen that you were transferred over to the Barry K?

(Testimony of E. P. Williams.)

A. How did I happen that I was tranferred?

Q. Yes. How did you happen to take over the Barry K?

A. Well, I was the oldest man in point of service, I suppose. I didn't question them on that.

Q. And when you took over the work of Master of the Barry K, who had been the pilot on her before? I mean the Master.

A. Who had been the Master?

Q. Yes. A. Reed, I believe.

Q. And that is the gentleman who just testified?

A. Yes, sir.

Q. And then when you became the Master, what was the position occupied by Captain Reed?

A. Pilot.

Q. Were you on duty at the time that the collision occurred—— A. No, sir.

Q. ——between the Barry K—you were not. Do you recall the lights having been lighted on the Barry K and her barges? [84]

A. Yes, they were all lighted when I was on watch, when I went on watch.

Q. When did you go off watch?

A. About 12:15.

Q. Will you state to the Court——

A. (Continuing): In the morning on February 1.

Q. 12:15? A. Yes.

Q. And where was the Barry K at that time?

A. The Barry K was just below the railroad bridge at Vancouver.

(Testimony of E. P. Williams.)

Q. Headed which direction?

A. Coming into Portland, downstream.

Q. Now, tell the Court what lights there were on the barges at that time.

A. Well, we had two barges in tow, number 22 and 24. There was a white light on the starboard corner, aft, and a white light forward on 22, and a white light forward on the port side of 24, and on the forward, on the aft end a white light; four lights on the barges.

Q. State whether or not those lights conformed to the practice which has existed in previous years.

A. The same lights used in all my experience of towing.

Q. And that is how many years last past?

A. Oh, my towing experience is probably fifteen years.

Q. What lights were there on the Barry K? [85]

A. The lights over the pilot house, their running lights; two lights over the pilot house, white lights.

Q. What was their purpose?

A. Range, to show her tow.

Q. What other lights?

A. There were two white lights for barge tow.

Q. Then what other lights in addition to those two white lights?

A. The running lights; a green light on the starboard side, a red light on the port side.

Q. Referring again to the barge lights, throughout what arc of the horizon did those lights shine?

(Testimony of E. P. Williams.)

A. The barge lights?

Q. Yes.

A. Well, they were on the—on the—just as to how far, how much of an arc they would show, they could be seen from each quarter.

Q. Each quarter?

A. And straight ahead.

Q. Each quarter and straight ahead?

A. Yes, sir.

Q. And the lights above the pilot house, throughout what arc of the horizon were they?

A. Visible all around the horizon.

Q. What distance could the lights on the barges be seen that particular night, would you say? [86]

A. Oh, at least two miles.

Q. What was the nature—

A. (Continuing): Probably more than two miles that night. It was a clear atmosphere that night.

Q. Was it dark?

A. A dark night, clear atmosphere.

Q. At the time that you went off watch, do I understand that the lights were all lighted and in the condition that you have just now described to the Court?

A. Yes, sir.

Q. Where was your room on the Barry K?

A. Underneath the pilot house, directly underneath.

Q. And did you go to bed as soon as you went off watch?

A. Yes, sir.

(Testimony of E. P. Williams.)

Q. At the time that you went to bed, did you notice what way the wind was blowing?

A. Well, there was a little wind out of the east or southeast.

Q. Do you know how many miles per hour it was blowing?

A. Oh, I would say twelve or fifteen.

Q. Now, did you go to sleep, do you remember?

A. I was—yes, sir; I was asleep.

Q. What do you next remember after you went to sleep following going to bed?

A. Well, I heard two blasts of the whistle.

Q. Two blasts of what whistle? [87]

A. Of the Barry K's whistle.

Q. What did that mean to you?

A. It meant a starboard passing.

Q. Was there anything surprising to you about hearing that whistle? A. No, sir.

Q. Did you at that time look out at all to see where the Barry K was? A. No, sir.

Q. Was your room, by the way, on the port or starboard side?

A. It takes up the width of the cabin on the port.

Q. The entire width? A. Yes, sir.

Q. Now, did you hear any answering whistle to these starboard passing whistles?

A. No, sir.

Q. Did you hear any more whistles following these two blasts that you have just indicated?

(Testimony of E. P. Williams.)

A. I heard the Barry K blow four short blasts.

Q. And was there any answer to that?

A. I didn't hear any answer.

Q. When you heard the four short blasts what did that indicate to you?

A. An alarm whistle.

Q. Did you do anything then?

A. Got out of bed. [88]

Q. Got out of bed. And where did you go?

A. Well, I put out on the main deck.

Q. And what did you see?

A. Well, there was a collision just before I reached—that was the deck, before I got out forward.

Q. When you got out there did you see the boat with which the Barry K had collided?

A. Yes, sir.

Q. Where was that boat?

A. She was off the starboard of us a little.

Q. What was the position of the Barry K at the time that you saw her?

A. Well, it was dark—I was a little bit confused, a person coming right out—I would say she was headed toward the east shore.

Q. The Barry K was headed toward the east shore?

A. Toward the east shore; yes, sir.

Q. What was the position of the Pennsylvanian?

A. She was laying quartering toward the east shore, or almost straight across the river.

(Testimony of E. P. Williams.)

Q. Following the time that you heard these two blasts, as you have testified, did you notice any change in the speed of the Barry K?

A. No, I didn't.

The Court: Did I understand you to say in your opening [89] statement that the pilot summoned the Captain, summoned the Master?

Mr. Young: Yes, he did a little later. Yes, your Honor, though I also stated, as the Captain has testified, the Captain, here, knew about there being a question of danger before he actually received the summons. I haven't got to the summons yet.

The Court: He is on the scene, now, though.

Mr. Young: Yes. He had just testified that he heard the——

The Court: But he was summoned, too.

Mr. Young: You heard the four danger blasts, but I haven't asked him this question about receiving the actual summons. I will ask you that now, Captain.

Q. Did you receive an actual summons to come out on the deck?

A. No, I just met the man to call me as I was on my way.

Q. You met the man? A. Yes.

Q. And who was the man?

A. The night watchman.

Q. What was his name? A. Kelly.

Q. Kelly? A. Yes.

(Testimony of E. P. Williams.)

Q. And where was he when you met him?

A. Right at the door. [90]

Q. As you were going out?

A. As I was going out.

Q. And what was Kelly doing at that time?

A. He had just come down from the pilot house.

Q. And did he at that time say anything to you about there being any danger?

A. Well, he knew that I knew there was danger. After he called me he was making his way on back to call other members of the crew, he told me.

Q. Now, when was that with reference to the time the collision occurred?

A. That was very shortly after or about the time the collision occurred.

Q. About the time of the collision?

A. About the time.

The Court: Did Captain Reed send him to call the Master and the crew?

Mr. Young: Pardon?

The Court: Did Captain Reed send Kelly to call the Master and the crew?

Mr. Young: Yes, your Honor.

The Court: You had better have him develop that on the stand.

Mr. Young: I can recall Captain Reed for that, your Honor. Yes.

Q. Well, now, at about the time of the collision, Kelly, as I understand, was talking to you. Is that correct? [91]

A. Yes, sir.

(Testimony of E. P. Williams.)

Q. Now, do you know whether the Barry K at that time had come to—was moving or standing still?

A. Well, as to that I couldn't say.

Q. And did you observe the position of the barges which had been attached to the Barry K when you came out on deck?

A. We was clear of the barges.

Q. Where were they?

A. They were—they was on,—oh, they was not so far up on the port side of us, just a short distance away.

Q. Could you at that time notice whether the lights on the barges were lighted?

A. I didn't particularly notice that. They possibly was turned more.

Q. To what did you first direct your attention upon going out on deck?

A. Damage to the hull. I first spoke to the pilot.

Q. You first spoke to the pilot?

A. Yes, sir.

Q. That is Captain Reed? A. Yes, sir.

Q. And when you refer to damage to the hull, damage to what hull?

A. Damage to the Barry K.

Q. And then what did you do?

A. On my way down to examine the hull with members of the crew. [92]

Q. And you went down into the engine room or into the lower part of the boat?

(Testimony of E. P. Williams.)

A. Went into the forward hold, first.

Q. And how long did you remain there following the accident?

A. Oh, possibly fifteen minutes, ten or fifteen minutes.

Q. Where did the Barry K go following the accident?

A. Across the river on the west side.

Q. Where did she tie up, do you remember?

A. She tied up at a dolphin just shortly below the—between the Lower Post Office light and the range light.

Q. Can you identify the place where the collision, itself, occurred?

A. Well, not so close, because I was in bed.

Q. Approximately where?

A. Well, it was almost abreast on the opposite side of the river from the Lower Post Office Range.

Q. Did you see these barges subsequent to this time, after your boat tied up?

A. Yes, I could—well, I could see the lights on the barges way down the river; yes.

Q. And did you have a close-up view of those barges at any later time?

A. At Terminal 4, after they were towed up.

Q. How were they towed up?

A. Towed up by the tug Cruiser.

Q. Now, at Terminal No. 4, what lights did you observe on the [93] barges of the Barry K at that time?

(Testimony of E. P. Williams.)

A. I saw the lights on all corners except the outside corner of 22, which was submerged.

Q. Submerged?

A. Yes, sir; the lower end, downstream end, was submerged.

Q. The downstream, would that be the rear or stern?

A. The same way. It was made fast to the tow. That is when we was hit by the ship.

Q. I mean that was the part of the barge that was next to the bow of the Barry K?

A. Yes, sir.

Q. Had there been a light on that end of the barge even before the accident?

A. Yes, sir.

Q. On which number was this again?

A. 22.

Q. I am not clear that I understand your answer. Prior to the accident what lights were there on Barge No. 22?

A. There was a light on the forward end from us, away from us, and on the starboard side and on the starboard side aft.

Q. And on the starboard side aft?

A. Yes, sir.

Q. And it was the starboard side aft light that was submerged?

A. Yes, sir.

Q. I see. How high were these lights on the barges above the [94] deck of the barges, would you say?

A. Oh, about five or six feet, between five and six feet.

(Testimony of E. P. Williams.)

Q. And were they all a uniform height above the level of the respective decks?

A. Yes, sir.

Mr. Young: You may cross examine.

The Court: Now, call Captain Reed and let's be sure to finish with him on that point.

(Witness withdrawn.) [95]

WM. A. REED,

produced as a witness in behalf of the Libelant, was recalled to the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Young:

Q. Captain Reed, at any time prior to the collision did you instruct anyone to call the Master or members of the crew? A. Yes, sir.

Q. Who? A. Mr. Kelly.

Q. And who was Mr. Kelly?

A. The watchman.

Q. Where had Mr. Kelly been stationed prior to the accident?

A. He was in the pilot house a short time before and he came right back and stood forward at the pilot house down to the deck.

Q. Where was he in the meantime?

A. Back to see if the deckhands were up to pick up that barge at West Linn.

(Testimony of Wm. A. Reed.)

Q. At where?

A. To see if they were ready to pick up the barge to West Oregon.

Q. West Oregon, yes. Now, did Mr. Kelly come back out forward before the accident occurred?

A. Yes, sir.

Q. And at what point of time before the collision was it that you called upon him to call the crew and Master? [96]

A. Well, shortly after I blew the last starboard passing whistle.

Q. And what instructions did you give him?

A. I told him to call the crew.

Q. And did you specifically mention the Master?

A. Well, I can't say. I told him to call the whole crew, call everybody.

The Court: Q. What else did you tell him? What reason did you give for it?

A. I told him we was going to hit.

Q. How soon after you had given this instruction to Mr. Kelly did the collision occur?

A. That is pretty hard to estimate. We was pretty close there and thinking about lots of things and it wasn't so very long.

The Court: What is the order of those whistles? I have dropped out one of the three starboard whistles, Mr. Young and Mr. Wood. I have here on the Barry "K" first two blasts followed by one by the Pennsylvanian. Then give me the sequence, will you?

(Testimony of Wm. A. Reed.)

Mr. Young: The first whistles were from the Barry "K", with two whistles.

The Court: Followed by one?

Mr. Young: Followed by one from the Pennsylvanian, followed by four blasts from the Barry "K"; no answer from the Pennsylvanian, followed by two blasts from the Barry "K"; no answer from the Pennsylvanian; next four blasts from the Barry "K"; no answer from the Pennsylvanian; next two blasts from the Barry "K", [97] followed by three blasts from the Pennsylvanian, followed by three blasts from the Barry "K".

That is all.

The Court: Mr. Wood?

Cross Examination

By Mr. Wood:

Q. Then it was immediately after your third two blasts that you dispatched Kelly to call the crew, because you thought there was going to be a collision? A. Yes, sir.

The Court: Q. You knew there was going to be one? A. Yes, sir.

Mr. Wood: Q. And how far were the ships apart then? I think you said a thousand feet, but I —

A. No, about 500 to a thousand.

Q. Five hundred to a thousand?

A. Yes, sir.

Q. And you called Kelly a watchman. What were his duties?

(Testimony of Wm. A. Reed.)

A. He is a lookout, but technically everybody calls him a watchman.

Q. And when did he leave the pilot house to go and tell the crew to get ready with the lines to pick up the barge? I don't mean by the hour of the clock, but was it before you saw the Pennsylvanian or afterwards?

A. It was after we saw the Pennsylvanian. [98]

Q. After the exchange of first signals?

A. No. Just before I blew our first signal or right close to it.

Q. Kelly left his position? A. Yes.

Q. And went aft to see about getting the lines ready to pick up this barge? A. Yes, sir.

The Court: Q. Went aft to see if the crew was ready? A. To see if the crew——

Mr. Wood: To see if the crew was ready to pick up this barge.

The Court: Q. Had some of the crew been sleeping? A. Yes.

Q. All of them?

A. No, just the deckhands.

Q. You went to call them for West Oregon?

A. West Oregon.

Mr. Wood: Q. And when did he return to the pilot house?

A. He never came back to the pilot house; he came back immediately forward of the pilot house right on deck.

Q. Just in front of you?

(Testimony of Wm. A. Reed.)

A. Just in front of me.

Q. What deck do you call that?

A. I would call it the cabin deck.

Q. That was the uppermost deck of the ship?

A. Yes, that he could get onto. About ten feet directly— [99] no, right down to measurements, he would be seven feet below me and directly in front.

Q. And when did he return to that place.

A. Immediately he went aft and came right back forward.

Q. Do you know how long he was gone?

A. He wasn't half a minute.

Q. And you were in the pilot house then alone except for the time Kelly was with you?

A. Yes, sir.

Q. And you regard him as your lookout?

A. Yes, sir.

Q. You had no lookout on the barges?

A. No, sir.

Q. Nor forward? A. No, sir.

Q. In other words, you alone with the assistance of Kelly were navigating the boat?

A. Yes.

Mr. Wood: That is all, your Honor.

Redirect Examination

By Mr. Wood:

Q. Did you ever carry a lookout on the forward end of the barge under those circumstances?

A. Not in clear weather. The lookout would be in or near the pilot house when navigating after night. [100]

(Testimony of Wm. A. Reed.)

Q. From where you were in the pilot house, could you see over the top of those barges clearly?

A. Yes, sir.

Q. At the time that you called Kelly and directed him to call everybody, all hands, when was that with reference to the time you stopped the engines of the Barry "K"?

A. That was just about the time I stopped the engines.

Q. That is all.

A. I did—may I say something?

The Court: Yes.

A. (Continuing) I didn't have to call Kelly; I just called to him. He was directly in front of me about seven feet where I wouldn't even have to holler; just an ordinary conversation, he would hear it.

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [101]

E. P. WILLIAMS,

resumed the stand as a witness in behalf of the Libelant and further testified as follows:

Mr. Wood: You had finished with Captain Williams?

Mr. Young: I think I would ask one further question, your Honor.

(Testimony of E. P. Williams.)

Direct Examination

(Continued)

By Mr. Young:

Q. Captain Williams, in your experience in travelling back and forth and past Post Office Bar, what is your judgment as to whether it is safe or practicable for a river ship to proceed upstream on the west side of the channel?

A. I think it is much more safer to pass on the east side of the channel.

Mr. Wood: That is not an answer to the question. I move to strike it.

A. How did you put that?

(The last question was read by the reporter.)

A. Not safe.

Mr. Young: Q. And in actual fact what has been the practice of river boats with respect to the use of the east side of the channel in going up and down?

A. Use the east side altogether, both ways.

The Court: Wait a minute. Going up, or going up and down? A. Up and down.

The Court: Both?

Mr. Young: Up and down, both; yes. I might say for the Court's [102] advice, the issue is solely with regard to the ship going upstream, but the witness's answer is broader than that.

The Court: Yes.

Mr. Young: Q. Then if you had, yourself, been in the pilot house on that particular night, which

(Testimony of E. P. Williams.)

side of that stream would you have piloted the Barry K up?

A. On the east side of the channel.

Q. And when you found the Barry K on the east side of the channel at the time the collision occurred, was there anything unusual about it being in that position so far as the side of the channel is concerned?

A. No, sir. That is the regular side to keep.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Now, Captain Williams, how long did you say you had been pilot or Captain of towboats? Did you say thirty-three years?

A. I said I had a license on river boats for about thirty-three years.

Q. But do you say you are now acting as a ship's pilot? A. Yes, sir.

Q. How long have you been doing that?

A. Oh, about four months.

The Court: You mean one of the Columbia River pilots?

Mr. Wood: That is what I am going to ask him.

Q. You mean the Columbia River Pilots Association? [103] A. Yes, sir.

Q. For the last four months?

A. Yes, sir.

Q. After this collision, did you remain for a time in the employ of the Western Transportation Company? A. Yes, sir.

(Testimony of E. P. Williams.)

Q. Do you know whether any instructions were issued by that company after this collision for its tugs and tows to keep to the right?

A. I never received one.

Q. You say you never received them. You don't know whether there were any or not. Is that what you mean?

A. I don't know. I said I never received any.

Q. Did you say that these lantern lights on those barges were visible through three-quarters of an arc of the horizon?

A. It depends on the position. They were on the corner of the board.

Q. I know. That is what I want to find out. The only way they could be put on the corner of those barges was to hang them on the nail wasn't it?

A. A hook.

Q. And that hook or nail, whatever it was, was nailed into the wall of the barges?

A. Just into the corner.

Q. Either on the forward wall or on the side wall, one or the other? [104]

A. Right on the corner, very close to the corner.

Q. Well. Now, these barges have a little deck around the house, all around the house, don't they?

A. There is a guard; yes, sir.

Q. And the lanterns that you have described are hanging on the wall of the house near the corner but not precisely at the corner, are they?

A. Right at the corner. The barges are constructed a little different.

(Testimony of E. P. Williams.)

Q. You draw it if you don't like mine. You draw it. Show me how those lanterns are placed.

A. I will have to draw a house on the barge.

Q. Well, I want you to.

(The witness drew on a sheet of paper.)

Q. Have you marked the position of the lanterns? A. Yes.

Q. There were not four lanterns on any of these barges?

A. I say that is the position of putting them out if you were only towing barges. It depends. If you had a barge alongside of you, you would use the other two lanterns on the other side of the barge.

Q. Were those lanterns on a bracket extending diagonally out from the corner of the barge?

A. No, they were on a hook close to the corner.

Q. Diagonally to the corner? [105]

A. Yes. Right out so the light—you mean straight in on the corner?

Q. Yes.

A. Usually pretty straight in, close.

Q. So that the lantern could be seen both from abaft and forward and the side? A. Yes.

Q. Is that what you say? A. Yes, sir.

Q. Now, Captain Williams, you said that this two-blast signal from the Barry K, which you heard, did not indicate anything peculiar to you?

A. No, sir; it didn't.

Q. You were in your cabin at that time, were you? A. Yes, sir.

(Testimony of E. P. Williams.)

Q. Were you asleep?

A. I had been asleep prior to the hearing of the two whistles, yes.

Q. But did the two whistles wake you up?

A. I imagine they did.

Q. And you recognized them as two whistles?

A. Two whistles.

Q. And they didn't in any way indicate to you the possibility of an accident coming?

A. Not those two whistles; no, sir.

Q. You thought that was quite in conformity with the Barry K's [106] custom to pass that way, did you?

A. That's right.

Q. Now, I want to ask you whether you testified before the United States Steamboat Inspectors——

The Court: Did he know where they were?

Mr. Wood: Q. Did you know where you were? Did you know where you were in the channel?

A. No.

The Court: Q. On the river. Did you know where you were on the river?

A. Not close at that time.

Q. Did you know you were in the Willamette?

A. No, sir.

Mr. Wood: Q. Where did you think you were?

A. Well, just as I woke up?

The Court: Q. When you heard those two whistles did you know where you were, whether you were in the Willamette or not?

(Testimony of E. P. Williams.)

A. Not exact position. I was in bed. I didn't know whether we had entered the Willamette or not.

Mr. Wood: Q. All right. I will ask you this. Let's assume you did know you were in the Willamette River and on Post Office Bar. Let's assume you knew that. And you had heard those two whistles. Would you say that meant nothing to you out of the ordinary?

A. That wouldn't mean anything to me; no, sir. [107]

Q. Not a thing. Because that would be in accordance with the Barry K's usual practice. Is that what you mean? A. Yes, sir.

Q. All right. Now, I want to ask you whether you testified like this before the United States Inspectors: "Question: When was your attention first drawn to the possibility of an accident? Answer: Heard the two blasts of the whistle of the Barry K." Did you testify like that?

A. I have no recollection of that.

Q. Here it is right in the middle of the page.

A. Not two blasts. That must be a mistake. There is a mistake there somewhere.

Q. You deny testifying like that?

A. I can't believe that I would. That is regular customary to hear boats passing at different points on the river blowing two whistles.

Mr. Wood: That is all.

(Testimony of E. P. Williams.)

Redirect Examination

By Mr. Young:

Q. I will ask you whether or not at the same hearing you were asked these additional questions and you gave these additional answers.

Mr. Wood: Are you impeaching him, now?

Mr. Young: No. I think——

The Court: Rehabilitating him.

Mr. Young: Yes. [108]

The Court: Yes, you are. I just happened——

Mr. Young: If the Court please, I am proceeding at this time upon this basis: that if counsel asks the witness——

The Court: Go ahead.

Mr. Young: ——a question with respect to a part of his testimony——

The Court: That is all we are interested in.

Mr. Young: ——I may ask the balance.

Q. “You heard two short blasts? Answer: I am not sure but there might have been two short blasts ahead of that. First I heard was two short blasts of the whistle.” Do you recall so testifying?

A. First I heard—that is the first I heard, was two short blasts.

Q. Were you asked this question and did you give this answer: “What did you do? Answer: Then I heard alarm whistles shortly after that.” Did you so testify? A. That’s right.

Q. And next, “What do you mean by ‘Alarm’

(Testimony of E. P. Williams.)

whistles? Answer: Four short blasts." Did you so testify? A. Yes, sir.

Q. "What did you do *then*? Got out of bed." Now, Captain, at the time you heard the two blasts of the whistle, did you get out of bed then?

A. No, sir.

Q. And why not? [109]

A. Didn't consider it anything only the regular passing whistle on some occasions, pass on either side.

Recross Examination

By Mr. Wood:

Q. Now, I am glad that counsel read the rest of that to you——

The Court: Let's put all that in, the whole record.

Mr. Wood: Shall I read it to you?

The Court: Put it in as an exhibit.

Mr. Young: If the Court please,——

The Court: All you are doing now is just reading it back and forth and putting your own emphasis, aiding on the one hand and making it difficult for the witness on the other, as to that testimony. Put it all in and claim everything you want for it and I will read it and consider it as part of the case.

Mr. Young: I want to understand what you mean. When you say "all" of the record, you mean the testimony of Captain Williams?

The Court: Well, usually we have all of these investigations put in, the whole record.

(Testimony of E. P. Williams.)

Mr. Wood: I am perfectly willing to do that.

Mr. Young: I have no objection to the testimony of Captain Williams. I object to the entire record. I think it is entirely irrelevant. It would be material only in the event there were some specific question which had to do with the matter of the impeachment of the witness involved.

The Court: Your office has often put the whole record in [110] these pilot board hearings.

Mr. Young: I am sure I don't know what the rest of the office has done in that. Mr. Wood has often put it in.

The Court: In this case I want it put in.

Mr. Young: Let the record show that I object to any part of the record being introduced except in so far as the testimony of Captain Williams is concerned.

The Court: The record may show that.

Mr. Wood: I am very glad to have it in. My own copy is marked up with a great many comments, and I suggest the proper way would be to get a clean copy from the Inspectors and put it in.

The Court: Clean or dirty. Any way so it is a proper copy of the proceedings.

We will adjourn, now, until tomorrow morning at 8 o'clock.

(Witness excused.)

(Thereupon, at 11:55 o'clock A. M., Court was adjourned until tomorrow, Wednesday, July 16, 1941, 8 o'clock A. M.) [111]

Wednesday, July 16, 1941, at 8 o'clock A. M., pursuant to adjournment, the following further proceedings were had:

Mr. Young: If the Court please, and with your Honor's permission, I should like at this time, just for the purpose of the record, to make a statement in regard to the admission in evidence yesterday of the transcript of the proceedings before the local office of the Bureau of Marine Inspection and Navigation with reference to the collision which is the subject matter of this litigation. There was no objection on my part to the introduction of that part of the transcript which had to do with the testimony of the witness, Captain Williams, himself. The objection, however, went to the entire balance of the transcript. By way of supplementing the objection then made, I wish to state that I believe the transcript to be, as a whole, entirely inadmissible for the following reasons: that it contains the testimony of a number of witnesses who probably will not even be present at this particular trial, and, as to them, their testimony in the prior proceeding would be entirely hearsay. Moreover, the testimony before the Investigation Board was all an *ex parte* matter in which there was no opportunity for cross examination of the witnesses on behalf of the SS. *Pennsylvanian* and being *ex parte* would be entirely improper at this time. Furthermore,—

The Court: What is the statement you just made?

Mr. Young: The testimony taken before the Investigation Board [112] was in the nature of *ex*

parte testimony for the reason that under the rules of the Board there is no opportunity allowed for cross examination of the witnesses by counsel for the opposing side.

The Court: Didn't you call the word "Pennsylvanian"?

Mr. Young: Yes. I am referring, now, particularly to the witnesses on behalf of the Pennsylvanian, because they are included in this transcript to which I am now directing my objection, and in so far as the matter is *ex parte* in effect it is quite clear that that testimony would not be proper to be presented in this court room in the form of a transcript.

The Court: You object to the findings of the Board being put in?

Mr. Young: Yes, your Honor, on the ground they would be entirely irrelevant so far as this proceeding is concerned. I think the transcript, itself, as I recall, does not contain any findings, but in the event that question should arise, it would be my position that that would be entirely irrelevant, incompetent, and immaterial so far as this proceeding is concerned, but moreover the transcript contains much material which is not testimony at all, but rather colloquy between counsel and the inspector, all of which is entirely irrelevant so far as this proceeding is concerned; that, finally, the only possible basis upon which testimony at the previous proceeding could be used here would be for the purpose of impeaching a witness upon the stand.

However, to use the testimony for that purpose it is necessary that the specific questions be called to the attention of the witness in [113] this proceeding toward the end that his answers, should there be any inconsistency, might be the subject matter of explanation by the witness at this time. I state that toward the end that our position with reference to that transcript may be clarified in your Honor's mind and for the purpose of your record.

Mr. Wood: Yesterday after your Honor requested that you would like to have the complete copy of the transcript before the Inspectors in the record, here, I went to the Inspectors' office and got a complete, clean copy, and have it here and was going to hand it to your Honor this morning in compliance with your Honor's request.

Now, Mr. Young really is not quite accurate in saying that this testimony is ex parte and that there was no opportunity for cross examination. The procedure at the Inspectors', as perhaps your Honor knows already, is that, first, they have an investigation. If that investigation seems to warrant preferring charges against any officer, then they have a second trial of that officer. Now, in this case they had the investigation. Now, the practice of the investigation is that interested parties are present, and after the examination of the witnesses by the Inspectors the interested parties are given the opportunity to cross examine the witnesses, to ask questions, not directly but through the Inspectors. That is, in this case the Inspectors would turn to

Mr. Young and say, "Do you have any questions to ask?" and Mr. Young would write his question out on a piece of paper and [114] hand it to the Inspectors, and the Inspectors would then ask the witness. The same thing was done with me. Now, as an instance of that, on page 22 of this transcript the Inspector said: "If there are any questions parties at interest would like to ask, they may do so through the Chairman of the Board. A Mr. Young, attorney for Western Transportation Company, wishes to suggest a question. (Writes question and submits to Chairman who refers same to Inspector Joachims.) Inspector Joachims: Requested question allowed." Then he asks it. "Was the Barry K in motion when the collision occurred?"

"A. He appeared to be.

"Q. What was the speed of the Barry K at the time of the impact?

"A. I could not assume that.

"Q. Is it not the practice for river boats at the point where the collision occurred, to proceed along the east side of the river, giving ocean ships the right of way in the main channel?

"Erskine Wood: Attorney for American Hawaiian Steamship Company. I object to that question, because no practice can go over the pilot rules. The rules are plain on that."

And Mr. Young and myself argued that point——

The Court: Well, since the practice question

which is being raised is a somewhat serious one, I will rule finally at the end of the trial on this, but I think we ought to standardize the practice. We have had this question up many times, and I don't see any reason now to depart from the established practice, and if you are not fully informed of what the practice has been, [115] Mr. Young, you might look into it further, and then, when you are fully prepared on it, I will hear you on it. Mr. Wood's office has urged on me more than once that there are definite precedents in admiralty, that the findings of the Board may come in, as I recall, in the nature of expert opinion testimony, something along that line. Your son cited to me an admiralty decision by one of the Portland admiralty courts in *New York v. Elliott*, two or three years ago.

Mr. Wood: I don't remember the case.

The Court: We had these findings in on the death case down by the bridge. That school boy was in the launch. We had them in just the other day in a case that Mr. Dezendorf tried. Those two come to mind, but there are others, I know. It nearly always follows that after the findings come in one party or the other thinks that the whole record should come in. That is the sequence usually.

Mr. Young: Yes. If the Court please, after your Honor had mentioned that other members of our firm had appeared in cases before your Honor where this same matter had come up and the transcript had gone in, I made some check, myself, and the

only cases I could learn about, the transcript went in by consent by both parties. In other words, there was no objection raised to the propriety of the documents being admitted in evidence. Obviously, if counsel for both sides consent to it, the point that I am now urging is not right. I have taken the position [116] that the matter is improper in the form——

The Court: For the present I will remain entirely uncontaminated and won't ask for it or read it, and at the end of this case will go to the bottom of it and attempt to settle it as a permanent rule of practice in these cases.

Mr. Wood: I think at this time I should offer the Pilot Rules in evidence. The Court, I know, will want them, and there has always been some question whether they ought to be in evidence or whether the Court takes judicial knowledge of them, and the simple thing is to offer them.

Mr. Young: I had assumed that they were part of the law and were before the Court, but I, of course, have no objection to their being introduced if counsel wishes.

The Court: They may be admitted.

(The copy of "Pilot Rules," so offered, was received in evidence and marked Respondent's Exhibit 9.)

N. W. STAYTON,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Captain Stayton, where do you live?

A. Portland.

Q. And how long have you lived here? [117]

A. Oh, about forty-seven or forty-eight years.

Q. And what is your occupation?

A. Columbia River pilot.

Q. How long have you been a Columbia River pilot?

A. Twenty years.

Q. How long have you had experience in the handling of boats on the Willamette and Columbia rivers?

A. I didn't get you.

Q. How long have you had experience in any capacity in the handling of boats on the Willamette and Columbia rivers?

A. About forty years.

Q. In the beginning, what was the nature of your work on the river?

A. Well, I began as a deck hand and——

Q. On river boats? A. On river boats.

Q. And how long were you a deck hand?

A. About four years.

Q. And then what were you after that?

A. A mate.

Q. And is this still on river boats?

A. Yes, sir.

Q. How long were you a mate?

(Testimony of N. W. Stayton.)

A. About two years.

Q. Then what next?

A. Master and pilot. [118]

Q. And have you been a Master and pilot since the time that you have just indicated?

A. I have.

Q. Now, what licenses do you hold?

A. For the Columbia River and its tributaries.

Q. And as I understand, you have had experience in the operation both of river boats upon the Willamette and Columbia rivers and also of ocean-going ships? A. I have.

Q. Since you have been a Columbia River pilot, has your work been primarily that of operating ocean-going ships? A. I have.

Q. In connection with your work, have you had occasion to be familiar with what is known as Post Office Bar in the Willamette River near its confluence with the Columbia? A. Yes.

Q. At how frequent intervals have you had occasion to go past Post Office Bar in your forty years or so of experience?

A. Well, since I have been piloting I would say from one to six times a week.

Q. That is in both directions on the river?

A. Either up or down.

Q. Captain, in the piloting of an ocean-going vessel, what is the width of the channel with which you are concerned?

A. Well, we are concerned with the deep water channel. [119]

(Testimony of N. W. Stayton.)

Q. And how many feet is that?

A. Thirty-five feet.

Q. Are you concerned with what has been referred to in this case as the thirty-foot channel?

A. I didn't understand.

Q. Are you concerned at all with what has been referred to here as the thirty-foot channel?

A. Oh, yes. We want to know where all of the water is.

Q. However, in the piloting of an ocean-going ship, what is the practice with regard to whether you confine the movements of the ship to the 35-foot channel?

A. We try to stay within the 35-foot contours, if it is possible.

Q. In the vicinity of Post Office Bar, do you know what the width of the channel there is? I am referring now to the 35-foot depth.

A. 35-foot depth, right at that Post Office Bar front flashing light, 700 feet, 35-foot depth.

Q. And how does the width of the 35-foot channel vary up and down stream from Post Office Bar?

A. Well, it begins on the upper end of Post Office Bar at the West Oregon mill. It is the full width of the river, there, and then it tapers down to 700 feet at the lower end—at the range and then from that on down why it continues out to about 600 feet out at the mouth of the river.

Q. Captain Stayton, do you know where the city limits of Portland [120] are with reference to the Willamette River and Post Office Bar?

(Testimony of N. W. Stayton.)

A. I think I do.

Q. Approximately where are they?

A. On a line just below the Terminal No. 4, and crosses the river there and comes in between the Associated Oil dock and the West Oregon mill.

Q. And how far would that be from Post Office bar, approximately?

A. Well, it is more than three-quarters of a mile above the upper end of Post Office Bar.

Q. In the piloting of ocean-going ships downstream from the city limits of Portland and on down past Post Office Bar, what is the customary speed of ocean-going ships at that point?

A. Well, there is no speed limit after you leave—that I know of, after you leave the city limits.

Q. What is the customary speed of ocean-going ships in going downstream?

A. Well, it depends a great deal upon the size and draft and how a ship handles and all of that. We—all the way from a slow speed to a full speed.

Q. Within what limits would that vary in miles per hour?

A. Well, about five or six miles an hour up to eleven or twelve.

Q. From your experience in the handling both of river boats and of ocean-going ships, what can you say as to whether it is safe or practicable for river boats to proceed either up or down stream on the west side of the channel in the vicinity of Post Office Bar? [121]

(Testimony of N. W. Stayton.)

A. I would say it is a very ticklish place for them to get into that bend, there.

Q. What would you say as to whether it is either safe or practicable for the river boats to use the west side of the river at that point?

A. I would say it was not safe or practicable, either one, because the channel hangs pretty close—closer to that side than it does to the east side.

Q. How does the depth vary from the west to the east side at that point?

A. Well, on the west side there is a dike extends along down Sauvie Island from Post Office Range east on down below Post Office Lower light, and it makes out from a shoal from that side, from the shore side out about 200 feet until it comes out to the main ship channel.

Q. And then what is the depth of the water as you proceed on over to the east bank?

A. Well, then when you leave the—after you get into the ship channel you cross the ship channel, then it begins to taper up on the other side and there is about 400 feet from the ship—the main ship channel—up to the shore line there where it tapers up, shoals up.

Q. Can river boats with safety to themselves use that side of the river which is close to the east bank?

A. Much easier than they can the west side.

Q. And why? [122]

A. Well, they are out of the way of traffic. 'Most

(Testimony of N. W. Stayton.)

all traffic comes down—coming down there swings into that bend and they have—slide over into that bend sometimes further than they figure they do unless they can make a short, quick and short turn, there, and it has always been customary to follow that bend around for deep water vessels, because in the earlier days why the channel was entirely around that side and we only had about 250 foot of a channel and then it has been widened. As it widened out why they have taken a little off of the east side of the channel and taken off until they have got it out to 600 feet now below the ranges.

Q. What has been the custom with respect to the side of the river which the river boats use in proceeding up and down Post Office Bar?

A. Ever since my beginning on the river, boats have always followed around on the east bank of the river, east side of Post Office Bar.

Q. That is, the river boats have always done that?

A. The river boats have always followed around that way with a tow. In the earlier days we used to tow over quite a bit further than that and up over in through a hole that was in a dike, but it has been filled in now with dredger dumps so they still follow the same—

Q. Now, you say that that custom has existed during all of your time. That is the past forty years, you mean?

A. It has with probably just one or two exceptions. Somebody would [123] get over on the other

(Testimony of N. W. Stayton.)

side and generally they get into trouble if they happen to meet a vessel coming down if they are coming up.

Q. Now, you mentioned that there is a dike on the west side of the river. To what extent would that dike present a hazard to river boats which, let us say, might be travelling up the west side of the stream at that point?

A. Well, at certain stages of the water, that dike is built of piling, rock, and such like, and there is no tall piling or dolphins or anything to mark the outline of that dike, and there is one spur in particular that projects out there and if a river boat was following that side and trying to keep out of the way of ocean traffic they generally get into that dike too close, especially if they have—are towing barges or something that has quite a bit of wind resistance and the wind is blowing from the east, it would carry them into that dike.

Q. Captain, assume the case of a river stern-wheel tugboat which is proceeding upstream with two barges, one on the nose and the other one on the port side forward, the over-all length from the stern wheel to the forward end of the leading barge being about 325 feet. In your judgment what distance would the pilot of that tug have to stay off this dike as a matter of safety?

A. Well, he would stay off at about the edge of the main ship channel. It would be about 200 feet.

Mr. Young: Yes.

(Testimony of N. W. Stayton.)

(The last question and answer were read by the reporter.) [124]

Mr. Young: Q. In referring to the main ship channel, what depth of channel are you referring to? A. 35-foot.

The Court: Well, now, do we understand the answer?

Mr. Wood: Yes, I thought the main ship channel as shown by the chart there extended right up to the dike. In fact, I thought the witnesses so testified.

Mr. Young: Counsel will argue the case in due course, I assume.

The Court: I think this ought to be made clear, at least cleared up for me. This is the kind of question that goes clear through the case and nobody agrees on the answer.

Mr. Young: I thought the answer was clear.

The Court: What do you claim the answer means?

Mr. Young: The answer means that the ship which is proceeding—the river boat proceeding upstream, if it is travelling on the west side of the stream, must travel approximately 200 feet out in the water from this dike in order to provide safety factors to itself.

The Court: Q. Is that what you mean by the answer, Captain? A. Yes.

Q. You must stay 200 feet easterly of the dike?

A. He must stay clear about 200 feet to give him a chance to make a swing.

(Testimony of N. W. Stayton.)

Q. To make it just as simple as possible, he must never get closer to the dike than 200 feet. Is that what you mean? [125]

A. That is what I consider safe; yes, sir.

Mr. Young: Q. Now, Captain, in the case of a river boat which is proceeding upstream on the right-hand side of this channel at this point, where would it be with reference to the curve of the river; that is, would it be on the outside of the curve?

A. No, —

Q. Going upstream?

A. It would be out, outside of the curve, yes.

Q. And what is the effect on a river boat—

A. Pardon me. I didn't just get that just right. He would be on the short side of the curve, you might say.

Q. He is coming up on the west side, now?

A. Coming up on the west side—

Q. Let us assume he is coming up on the west side. Is that on the outside of the curve?

A. That is the outside of the curve.

Q. What is the tendency of a river boat in making a turn on the outside of the curve with reference to side-slipping?

A. Well, a steamer coming down, there, he comes down and naturally his stern swipes around and throws his swell in towards the curve, and it would throw it towards the stern-wheel boat, or the up-river boat.

Q. What effect would that have on the up-river boat?

(Testimony of N. W. Stayton.)

A. Well, if he had barges or such like as that he would get more of a swell and more of a disturbance in there than he would on the [126] other side where the stern was throwing away from him.

Q. Is this swell to which you refer what has been mentioned here as a displacement swell?

A. Both a displacement swell and a kick-water swell. There is very little kick-water swell. It is mostly a current in an ocean-going vessel.

Q. To what extent does the amount of this displacement swell of the ocean-going ship depend upon the speed of the ship?

A. It depends upon the speed, size, draft.

Q. The draft, also? A. The draft, also.

Q. And as the speed of the ship and the draft increase, what effect does that have upon the displacement as well?

A. It generally makes more of a swell.

Q. Now, Captain, in your judgment, if a river boat with the tow, as I have indicated, were proceeding up the west side of the channel opposite Post Office Bar and an ocean ship were going down in the channel, how far would you say the river boats would have to stay away from the ocean-going ship for factors of safety?

A. Well, they would stay away—there is plenty of clearance in there all right, if the river boat—or the ocean-going vessel was in the channel, in the center of the channel.

Q. What is your answer to the question as to how far apart they should stay for safety?

(Testimony of N. W. Stayton.)

A. Well, fifty feet is safe. Just a miss is safe, all right. [127] Lots of times we just miss one.

Q. Well, is it a good idea to be running close enough that you just miss one?

A. It is not a good idea.

Q. To what extent does the answer to your question depend upon the length of the ocean-going ship?

A. Well, if an ocean-going vessel is coming down there and the vessel would be around 400 feet in length, I should say that the vessel should be at least a hundred feet away from the tow, anyhow, or a vessel that was in the bend.

Q. Now, what effect does an easterly wind at that point have upon the operation of river boats with tows if they are staying over on the west side of the river?

A. It has a great deal of effect. That is the greatest menace to a river boat towing along the Swan Island side or the west side of the channel.

Q. Will you explain your answer now?

Mr. Wood: Q. The Swan Island side, did you say?

A. Yes, the Swan Island—the west side of the channel. Or not Swan Island. Sauvie's Island, I should say. Pardon me.

Mr. Young: Q. Pardon me. I think there is no controversy. The river bank on the west side of the river opposite Post Office Bar is Sauvie's Island. Yes. Go ahead, Captain.

(Testimony of N. W. Stayton.)

A. Well, an east wind strikes right across there, and if a boat is towing barges with a high deck-house or a high fence house on [128] it, such as these sawdust barges are accustomed to have, that wind has quite a bit of resistance on this barge, and they are flat on the bottom and they slide to a great extent, and a boat coming up there is almost got to come kind of quartering to the wind and in the stream at the same time to hold her head up to this wind, if she doesn't have enough headway to withstand that resistance or slip that they would have from the wind.

Q. Would a wind of, say, an easterly breeze, of, say, ten to fifteen miles an hour have that effect?

A. Yes, a ten-mile breeze would have quite an effect on a light barge with a high house.

Q. The evidence in this case——

Mr. Wood: Excuse me a second. I should like to interrupt, with everybody's permission. I should like to know if the witness understands these barges were loaded. They weren't light.

Mr. Young: If the Court please, I think opposing counsel will have proper opportunity for cross examination.

Mr. Wood: It was for clarity that I suggested that.

Mr. Young: Q. Captain Stayton, the evidence in this case indicates that the Barry K at the time of this accident, it being a stern-wheel boat about 165 feet over-all, had a barge on the nose and one

(Testimony of N. W. Stayton.)

on the forward port side, the total length over-all being about 305 feet. These barges stood—the deck-houses on the barges were about twenty feet high above the water line. The highest point on the Barry K, itself, according [129] to the evidence, is around 34 feet up to the top of the pilot house. The barges were loaded at the time of the accident. The draft of the barges was between four and five feet, and the draft of the Barry K, two feet eight inches. Now,—

The Court: They were loaded with paper.

Mr. Young: Loaded with paper, yes.

Q. Now, Captain, would the ten to fifteen-mile easterly breeze under those circumstances produce the effect upon the river boat and the tow which you have indicated?

A. I would say it would, because a four-foot draft barge flat bottom with a high deckhouse, as you have stated, on those barges, would have quite a bit of wind resistance. Another thing, barges and the length of the boat extended out there from her rudder, which is in the stern of the vessel, about three hundred and some feet, and those rudders there are only in the water around about three feet or something like that. It is customary. I suppose hers is the same way as the others.

Q. Now, you testified that the river boat, if proceeding upstream on the right-hand side, would be required to quarter into the wind. To what extent would this quartering necessitate the river boat

(Testimony of N. W. Stayton.)

taking up more space on the water's surface than if it were not required to quarter?

A. Well, it would be quartering on either side of the channel. She would have to hold herself in practically the same position. On the east side of the channel they have a little protection [130] from the trees over there, more so than they do on the embankment, more than they do on the west side, but that barge would probably be travelling up the river at about—well, sometimes they travel up the river almost at a 25-degree angle.

Q. What I am getting at is, if the barge is travelling up the river at a 25-degree angle, state whether or not it is requiring more surface of the river in which to travel than it would if it did not have to travel at the 25-degree angle, but could go straight ahead.

A. Certainly it would take more.

Q. Now, in the event that the river boat, however, is over on the east side of the river and either at the edge of the channel or in the shallow water, to what extent does it have protection there from this wind effect that you have mentioned?

A. From the east side, it is protected by trees and an embankment to a certain extent.

Q. Captain, are you familiar with Article 25 of the Pilot Rules, which refers to narrow channels?

A. I think I am.

Q. Assume, Captain, the case of an ocean vessel which is proceeding down the channel of the Willa-

(Testimony of N. W. Stayton.)

mette River past Post Office Bar. What can you say in light of Article 25 is the duty of the pilot of the ocean-going vessel with reference to whether he may insist or not upon proceeding down on his right-hand side?

A. Well, Article 25 says you shall pass port to port, unless you [131] find it unsafe or impractical to do otherwise.

Q. Suppose that that ship in proceeding downstream meets a river boat which is proceeding upstream and is on the same side of the river as the downstream vessel. What, in the light of Article 25, would you say would be the duty of the pilot of the downstream vessel?

A. Well, in all my experience, it has never been considered safe and practical to be around in that bend. In the first place, to enter that bend from the lower end, the beam of 3 Tree beacon or around Gillihan Point, a vessel coming up around that bend, it would have to cross in around the point and keep there, which he would be pretty close in to the channel on that one particular point, there, and then he would have to follow that bend all around in there, and especially if there were any other vessels meeting or anything else in there, and sometimes there are as many as four and five towboats along Post Office Bar at one time. If four or five towboats should be up in that bend at Post Office Bar at one time, they would extend out across the ship channel, and whatever ship came down, if one

(Testimony of N. W. Stayton.)

should happen to come at that time, he would have to get out of the channel or over some place or stop until they got out and gave him a clearance. Otherwise they can tow around the east side of the channel and keep away—they are coming away from the ships all the time, and keep away from them at all times, if the ship will stay anywhere from—well, if he would stay even inside of the 35-foot contour they [132] have plenty of room over there to go over there. They've got four hundred feet from the ship channel over to the dike.

Q. Now, who has the four hundred feet from the ship channel of the 35-foot contour to the dike?

A. On the east side.

Q. And that would be available for which boat?

A. River boats could go in there, or any of these river boats, up to eight- or ten-foot draft, could go in there.

Q. Is it your understanding and based upon your experience in the operation both of river and ocean-going ships at this point and under Article 25, the pilot of the downstream ocean-going vessel has any absolute right to stay on his right-hand side of the river when meeting a river boat?

A. He has—I wouldn't say that. The pilot has the right to stay on the right-hand side of the channel, on the right-hand side of the channel, but a river boat can get out of the channel if he wants to.

Q. And then within the meaning of Article 25 would a starboard to starboard passage under those

(Testimony of N. W. Stayton.)

circumstances meet with requirements of safety and practicality at that point?

A. A starboard to starboard passage is what all towboats and ocean-going vessels have generally held up to.

Q. To what extent, Captain, can you say that tugs and river boats have occasion to use the Willamette River in the vicinity of Post Office Bar day by day? [133]

A. There is more than ever going up and down there now. You hardly ever go by there but what you find from one to four or five tugs in that district.

Q. And about the 1st of February this year, and for some months before that, what would you say was the situation in that regard?

A. Well, it has been that same situation for the past year or more.

Q. Is this custom of river boats to use the east side of the river in passing Post Office Bar well known among the pilots in the Columbia River?

A. It is.

Q. And it has existed, you say, for at least forty years to your knowledge? A. It has.

Q. Captain, assume that you were piloting an ocean-going ship downstream at Post Office Bar or anywhere on the river for that matter in the night time, and ahead of you you should observe a ship or boat approaching with two white mast lights, and then ahead of it—and also either a red

(Testimony of N. W. Stayton.)

or green side light—and then ahead and near the water line you saw at least two white lights, separated some distance apart. What, if anything would those signals mean to you as to the identity of the vessel approaching?

A. I would think it was a towboat of some kind approaching with barges ahead of her or alongside.

Q. Will you state whether or not it has been the practice for years past for towboats pushing barges ahead to have those barges [134] lighted on the forward corners by ordinary white lights?

A. It has been.

Q. And is that circumstance well known to pilots in this area? A.. It is.

Mr. Young: You may cross examine.

The Court: No. Just a minute.

Q. How about the depth of the water along there? What do the charts show as to the depth right up to the dike?

A. There is a dike on both sides.

Q. On the west side.

A. On the west side, they show——

Q. Here is the chart if you want to refer to it.

A. Do you want me to go over there?

Q. Bring it out quickly, please. Step down to the chart.

A. Well, this chart doesn't show the soundings in there within about a hundred feet—within about a hundred feet of the dike, Judge.

Q. And what water is shown nearest?

(Testimony of N. W. Stayton.)

A. The shoalest water shown along there is about twenty-nine feet within about a hundred feet of the dike.

Q. What is your idea as to how far out from the dike the 35-foot channel begins?

A. The 35-foot channel begins right along this line here (indicating). This is the contour line of the 35-foot contour, and then this little line, this little dotted line in here, shows the 30-foot [135] contour along in there.

Q. How close in to the dike, if you were going down the left side, would you take a load of ocean-going boats four hundred feet or so long?

A. I wouldn't go within a 300 feet of the dike with an ocean-going vessel in close quarters.

Q. Aside from meeting traffic or anything else, just suppose you had the fairway clear.

A. If everything was all in the clear I would go right down the middle of the ship channel, which would be about 500 feet off from the dike.

Q. And what is your idea about how far out from the dike the 35-foot water begins?

A. The 35-foot water begins two hundred feet from the dike.

Q. And that channel is 700 feet, as I understand?

Mr. Wood: 800 feet—it is a 30-foot channel, which is the former channel. In recent years it has been deepened to thirty-five feet. But the 30-foot channel which prevailed for years is 800 feet wide.

(Testimony of N. W. Stayton.)

Mr. Young: If the Court please, counsel has made a statement, here. I should like——

The Court: Get on the witness stand, Captain.

Mr. Young: I should like to make one statement with reference to what counsel has just said, that the 30-foot channel is wider than the 35-foot channel, and the witness in his testimony with [136] reference to the position which is to be, in his judgment, occupied by the ocean-going ships, would be confined to the 35-foot channel rather than the 30-foot.

The Court: Cross examine, Mr. Wood.

Cross Examination

By Mr. Wood:

Q. Taking up your answer to almost the last question, Captain, I want to make sure about it. If you were coming down on an ocean steamer, a pilot on her bridge, and you met a towboat coming up a mile away and you elected a starboard to starboard passage, you would go to the left. Did you say you would not go within 300 feet of the dike, or 300 feet of the edge of the channel? What did you say?

A. No, I wouldn't go within 300 feet of the dike, I said.

Q. You mean you would go then how close to the edge of the——

A. I would go out close to the edge of the channel. That would be within—within a hundred feet of the 35-foot contour along there, and that would be about 300 feet from the dike.

(Testimony of N. W. Stayton.)

Q. That is as close as you would go?

A. Yes, sir.

Q. And what would you expect the river boat to do?

A. Well, any time I would ever go down there, I would expect one of these towboats or river boats to be going—heading over for the east side of the channel.

Q. How far? [137]

A. East side of the river.

Q. How far over?

A. Well, they generally go over and give us plenty of clearance down there, and that is a custom that is known to all—pretty near every towboat man. I don't know a towboat man that doesn't understand that, getting over there and getting out of the way, and if I saw a towboat ahead of me in the channel on the west side of the river, I would begin to get my ship under control and get her stopped, because I would know that that man was an inexperienced man or would feel that he was inexperienced or a stranger or something, that wasn't acquainted with the conditions in that bend.

The Court: Q. Do you have tourists on the river as well as on the highways?

A. Well, we do sometimes. Strangers come along there that are not accustomed to that towing, that have been on some other kind of a boat or something.

(Testimony of N. W. Stayton.)

Mr. Wood: Q. Now, to get back to my question, I wish you would answer it. If the towboat meets a ship coming down, what is the towboat supposed to do if she elects a starboard to starboard passage?

A. Well, he generally starts to haul over, and if he is out far enough—but as a general thing they keep over. They are over there in the beginning.

Q. If the towboat elects a starboard to starboard passage, she is [138] supposed to yield the whole ship channel to the ocean steamer and to get over in the shoal water where the ocean steamer can't come, is she not?

A. Well, yes. He generally goes over that way.

Q. That is what is expected of her, isn't it?

A. The edge of the channel.

Q. You know, don't you, that in narrow channels if one boat blows two blasts that is only an invitation to the other ship, a request, for the starboard to starboard passage. You know that, don't you?

A. Certainly.

Q. And you know, don't you,—

A. (Continuing) That means that he is directing his course over to the—

Q. You also know that the boat that blows the two blasts takes the risk of the passage, doesn't she? She has got to get out of the way?

A. I don't know as it is taking any risk. I never knew he was taking any risk, any more than he was any other way.

(Testimony of N. W. Stayton.)

Q. Well, don't you know that the ship that blows the two blasts in a narrow channel assumes the risk of the passage being successful?

A. If a vessel chooses——

Q. Now, answer that question, please, and then you can say what you want.

A. I didn't get the question so I could answer it. [139]

(The last question was read by the reporter.)

A. No, sir.

Mr. Wood: Q. All right. Then you do admit, however, that in this particular vicinity, Post Office Bar, the towboat coming up and blowing two blasts is expected to yield the full ship channel to the ship and to get away over into the shoal water. That is true, isn't it?

A. I don't know as that is true.

Q. Well, I think I can refer to your testimony before the Inspectors about that if you will give me just a moment. I will ask you whether you testified like this on page 34 of your testimony.

Mr. Young: What page is that?

Mr. Wood: 34.

Q. (Continuing)

“Q. Do you claim that she had the right to be over on the lefthand side of the channel because she had this tow?

“A. I don't consider that a ship channel when she gets out of the 35-foot contour.

“Q. Then in your opinion if she is going to

(Testimony of N. W. Stayton.)

be on the lefthand side of the channel coming up, she should be outside of that 35-foot contour?

“A. Well she should be, but I don’t consider that the ship in meeting any vessel, up or down, has any right on a 600-foot channel to be to the extreme right or left of that channel meeting any ship or ocean-going vessel, or an ocean-going vessel in the Columbia River.”

Did you testify like that?

A. Well, I think that answers my question, that I don’t think—that a ship coming down there should take up a 600-foot channel [140] if he has all of the rest of the clearance where we go down the river. We used to run the Columbia River with a 250-foot channel, and we have only a 500-foot channel from the mouth of the Columbia River to the sea, with the exception of a few places. All dredge cuts are only 500 feet.

Q. Well, you do admit, here, don’t you, that you testified that the up-coming towboat ought to keep out of the ship channel entirely if she assumes that passage?

A. I will say the same thing of a good many other things—yes, I will say the same things of other things.

Q. All right. Now, to get back to this old-time channel that used to be there, how wide was it, the ship channel?

A. The ship channel was 250 feet wide.

(Testimony of N. W. Stayton.)

Q. And how deep was it?

A. It was twenty feet deep originally.

Q. How long ago are you speaking of?

A. I am speaking back to 1916, when I was working for the Port of Portland, when I began on the project of digging it to twenty-five feet.

Q. And it was under those conditions that this custom started, was it not, that is, of towboats claiming their right to keep to the left-hand side?

A. It was there when I started in around—as I was working on deck on vessel in 1905 or 1895—I started in 1894, and I remember a little back about 1895. [141]

Q. At any rate, whenever you started, when the channel was 250 feet wide and twenty feet deep, the custom then prevailed for towboats to come up on the left-hand side, didn't it?

A. It has always been that way.

Q. And then when was the channel widened?

A. Well, the channel has been widened from time to time until around three or four years ago it was widened; they took that point off over there across from Post Office Lower light and extended it down there and widened it out to 600 feet.

Q. No, it is widened to 800 feet, is it not?

A. It is not widened to 800 feet only—it is 600 feet right abeam of Post Office Lower light. It is 625 feet right abeam of the rear range—

Q. What depth channel are you talking about?

A. At thirty-five feet.

(Testimony of N. W. Stayton.)

Q. I am speaking of the 30-foot channel.

A. Thirty-five feet is what the Government Engineers figure for a ship channel. They don't make——

Q. How long ago was that 35-foot project adopted?

A. The 35-foot project was adopted about—well, I don't know. About six years ago they started in on that project and they deepened to thirty-five feet. The dredges was digging to thirty-seven feet, leaving two foot for silting, with a thirty-five foot channel, and that was the first time after that project was put through that we could get down the river with a 32-foot draft vessel. [142]

Q. And at the present time there is a ship channel there thirty feet deep and 800 feet wide, isn't there? You can see it on the chart, if you want to.

A. It is more than 800 feet, Mr. Woods. It is more than 800 feet at thirty feet wide.

Q. All right. Eight hundred feet is wide enough for me. Even in the old days when the channel was 250 feet wide, how did ocean-going steamers meeting there pass?

A. Why, in olden days, or in my beginning, when large steamers was coming down there and had to pass, one vessel had to stop while the other one—and they would drift by each other. They would begin to slow down and finally come to a stop.

Q. How did they pass? Did they pass port to port?

(Testimony of N. W. Stayton.)

A. The ocean-going vessels always passed port to port.

Q. In that channel? A. Yes, sir.

Q. Even at its narrowest time? A. Yes.

Q. And now they pass there port to port all the time without the slightest difficulty, don't they?

A. They do if there is no obstruction in the way.

Q. They don't even have to slow down to pass each other in that 600-foot channel, do they?

A. It depends on the class of vessel you are handling. You wouldn't expect to run two heavy-draft vessels through there at [143] full speed, meeting.

Q. On this question of the speed of ships going down the river, Captain, you said that the ocean steamer makes a displacement wave depending on her draft and speed and size, didn't you?

A. Yes, sir.

Q. And you implied, if I understood your testimony, that the displacement wave of such a steamer going down Post Office Bar might be some handicap to the up-coming towboat if she took the right-hand side. Did you make that implication?

A. I think I said the left-hand side, if she took the left-hand side, didn't I?

Q. Now, I mean if the towboat came up in obedience to the rule on the right-hand side?

A. If the towboat came up on the right-hand side?

Q. Yes. And met an ocean-going steamer coming

(Testimony of N. W. Stayton.)

down. Did you say that the displacement wave of the steamer might have an injurious effect on the towboat?

A. If a vessel is travelling real fast, the displacement swell throws out from both sides of the vessel and there wouldn't be but—it would be—the vessel making the curve, if the vessel was in making the curve would throw most of her swell into the curve——

Q. What do you mean? Her displacement swell?

A. Yes. Her displacement swell and her stern swell, too. Some vessels have more of a stern drag and more of a stern swell than others. [144]

Q. Well, that depends greatly on the speed of the steamer, does it not?

A. Well, yes; the speed and size.

Q. Now, don't the Inspectors' rules require steamers to slow down when passing other craft in narrow channels under circumstances where the displacement swell may affect the other craft?

A. I have never seen it.

Q. I say, don't the Inspectors' rules require something like that?

A. I have never seen nothing of that kind, don't know of anything of that kind.

Q. Can the towboat by herself slowing down reduce the effect of the displacement swell, say, on the line, breaking her lines on her barges?

A. Well, when they strike those swells, as a general thing they stop the boat and just let them take it, and they have to take it the best they can.

(Testimony of N. W. Stayton.)

Q. I say that reduces the effect?

A. Yes, that reduces the effect of this.

Q. How long do they have to stay stopped? A minute?

A. Sometimes the swell kind of quiets down. You can't—

Q. How long is it, ordinarily, when a ship passes? A. I would say a couple of minutes.

Q. Two minutes? All right. Now, when you said that the Barry K and her two barges could have come up there on the right-hand side and keeping two hundred feet off the dike, what position did you [145] mean that the Barry K was then in? Did you mean she was coming up a little athwartwise of the channel as you intimated they sometimes do, or would she be coming up straightwise of the channel?

A. I think when I made reference to that, my reference was to a beam wind and a wind blowing from the east across there. If there was no wind, or if the wind was from the other side, she would always head into the wind, if she has got a heavy tow that way on her bow and a high deckhouse.

Q. That is what I was coming to. If the wind were coming straight downstream, she would get in closer to the dike, wouldn't she, than if it was coming from the east?

A. If it was blowing directly about from the south, you might be able to get in a little bit closer.

Q. And suppose the wind was blowing from the west?

(Testimony of N. W. Stayton.)

A. Well, if the wind was blowing from the west, he could probably get in a little closer, because he would have a chance to get away from the dike.

Q. Now, we come to a specific question, here. Assume that there was a ten-mile breeze from the east and a current downstream of perhaps a mile an hour. How close would the Barry K have got in to the dike if she came up on the right-hand side?

A. Well, if the Barry K was coming up along that shore and he saw fit, he could land agin that dike if he had to, but to tow along there safely I would say that he should stand off from that dike at least 200 feet. [146]

Q. You mean with the stern——

A. With an east wind.

Q. With the stern of his ship 200 feet off the dike?

A. Well, from where the bridge of the ship might be. His stern might be closer than that to it, but his bow would probably be further away.

Q. That is what I was coming to. His stern would be in even closer to the dike?

A. Yes, his stern would probably be closer to the dike, but he has got to allow room for his stern wheel fanning around there that he doesn't pick up that dike.

Q. And that would be safer for him to do if the bridge part of his ship was 200 feet off from the dike?

A. That would depend a good deal, too, on the

(Testimony of N. W. Stayton.)

height of the water in the river. If that dike was covered, I don't think that any stern-wheeler towboat man of any kind——

Q. All right. How much clear water would that leave for the down-coming ship in the 30-foot channel? A. In the 30-foot channel?

Q. Yes.

A. He would have 600 feet, six to seven hundred feet, seven hundred feet on the bend and six hundred feet on the straight-of-way through there.

Q. And that would be a perfectly safe passage, wouldn't it? A. I should think so. [147]

Q. I think so, too. In fact, when you testified before the Steamboat Inspectors, you admitted that there was room there for a down-coming steamer and a towboat to pass, with the towboat passing on either side of the steamer, didn't you, and safe and practical to do it? If you don't remember it, I will read it to you.

A. I don't think I said that it was safe and practical—or that it was practical to do it. He could pass with safety, but not with the same amount of safety that he could on the other side.

Q. I will read you this testimony and ask you if you so testified.

“Q. Suppose that there is only one down——”

Mr. Young: What page?

Mr. Wood: 39, the top of page 39.

Q. (Continuing)

“Q. Suppose that there is only one down-

(Testimony of N. W. Stayton.)

stream ocean-going vessel and one upstream river boat. Is it not a fact that whether the river boat needs to go completely out of the channel would depend in part at least upon just how much of the main channel the ocean-going boat is occupying?

“A. That is true. There is room enough for an upcoming river boat and a downgoing ocean steamer in that channel to pass port to port, providing there is no other ocean steamer in the vicinity.”

And—well, I will ask you, do you remember testifying like that? A. Yes, sir. I say so yet.

Q. And did you testify as I am about to read to you?

“Q. Captain, assume that there is only one ocean-going steamer, going downstream and only one river boat with tow coming upstream, and let us assume that they are going to make a starboard to starboard passage. Is it [148] not a fact that in deciding whether the upstream river boat will have to go completely out of the channel to the east side in making this passage will depend upon the position of the downstream ocean-going boat in the channel?

“A. A downstream ocean boat can go down the center of the channel and there would still be room on either side of him for a steamer to pass.”

Did you so testify?

(Testimony of N. W. Stayton.)

A. Certainly. He has got 300 feet; that is, you might say, 250 feet anyhow on either side of him and still stay in the 35-foot contour.

Q. And on the top of page 40, I will ask you whether you testified—I am only reading part of an answer—“He” (that is, the ocean-going steamer)—“He tries to keep in the center of the channel as near as he can, and there would still be room in the channel for an upcoming vessel to pass.” That is true, isn’t it? A. Yes.

Q. Now, Captain, let’s get back to this wind a bit. These Western Transportation Company towboats tow these paper barges winter and summer, all the time, don’t they?

A. I don’t know anything about their custom.

Q. Well, don’t you meet them on the river at all times?

A. I meet them, yes. I meet them, but I don’t know their customs.

Q. Don’t you know they are towing barges from Camas in the winter as well as in the summer?

A. I see all kinds of towboats towing barges and such like all the time, but I don’t pay any attention as to whose boats they [149] are in particular.

Q. Well, do you think that when there is a 40-mile wind blowing on the river—that is quite a little storm—that these towboats and barges lay up or continue to navigate?

A. Well, I don’t know. I don’t think there would be many boats towing barges of that class around

(Testimony of N. W. Stayton.)

and made fast to them in a 40-mile breeze on the river.

Q. Well, how much of a breeze can they navigate in?

A. Oh, I suppose a 20-mile wind on the river, why they would still be safe. I don't think they would kick up such a swell but what they could make fast to it. But a 40-mile breeze is a good, strong breeze.

Q. Then you wouldn't consider a 10-mile breeze any particular handicap to them, would you?

A. I wouldn't only just where they have to tow across what they call an abeam wind, striking them from one side or the other.

Q. Would a 10-mile wind make them hard to handle?

A. It would to a certain extent. It would depend upon just exactly what they wanted to do with them, you know; if they could keep going with good steerageway, that way they could hold up to the wind, and it wouldn't be so bad that way, but then when they stopped, with a 10-mile breeze it is quite a little breeze to try to handle anything 300 feet ahead of your rudder, like one of those little river boats have got.

Q. Captain Stayton, do you mean to imply they are a menace to navigation? [150]

A. They are not a menace to navigation, certainly not. A tugboat is not a menace to navigation as long as they are not directly right within the

(Testimony of N. W. Stayton.)

path of a ship. If a ship has got clearance on either side of them I wouldn't consider they was a menace to him.

Q. Wouldn't you say that if they can't control themselves in a narrow channel and they slide around in a ten-mile breeze that they were a menace to navigation?

A. I couldn't say that they were a menace to navigation; no, sir.

Q. All right. Now, you tow boats all the way up through the harbor of Portland, don't you?

A. Yes, sir.

Q. You have towed them many times, haven't you? A. You bet I have; you bet.

Q. Barges and everything else, haven't you?

A. Yes, sir.

Q. How wide is the river in the harbor at Portland?

A. From bank to bank most of the way, from one shore to the other.

Q. I say how wide is it?

A. How wide is it?

Q. Yes.

A. I don't think there is a place that is less than a thousand feet, with the exception of down here—between the Broadway Bridge and the Steel Bridge.

Q. That is what I was thinking of. How wide is it at the Steel Bridge? [151]

(Testimony of N. W. Stayton.)

A. Well, it is around 840—no——

Q. There is quite a bend there, too?

A. I think the full width of the river is 840 feet.

Q. Quite a bend in the river, there, too, isn't there?

A. Well, the bend comes above the Steel Bridge.

Q. Well, don't tugs and tows customarily pass ships port to port here in the river?

A. Not necessarily; no, sir.

Q. I say don't they usually? A. No, sir.

Q. You mean they disobey the Pilot Rules?

A. Sir?

Q. Do they disobey the Pilot Rules?

A. Well, tugboats, they pass through the draws where they have to, such as the Steel Bridge, but where they can go underneath a bridge, like when the water is low enough, like the Burnside Bridge or the Broadway Bridge, they generally go under either one of the side spans. They try to avoid the channel—the draw span—leave that in the clear. The Steel Bridge, they can't go under that.

Q. Were you a river towboat man for many years? A. Me?

Q. Yes. A. Yes, sir.

Q. In fact, most of the pilots in your Association—do you belong [152] to the Columbia River Pilots Association? A. I do.

Q. And most of them are graduates from the towboat business, aren't they?

(Testimony of N. W. Stayton.)

A. About two-thirds of them, I would say.

Q. And you are one of that class?

A. I am; towboats and passenger boats and such like.

Q. Do you have the idea that the river steamboats and these tugs and tows are not bound by the Pilot Rules?

A. Not bound by Pilot Rules?

Q. Yes.

A. Well, they are bound by Pilot Rules the same as any other vessel now. They have got to navigate.

Q. What do you mean by "now"? Weren't they always?

A. No, these diesel tugs were not at one time.

Q. Well, do you have the idea that it is sort of a custom and understood on the river that the tugs and tows are not going to be bound by the rules?

A. Why certainly they are bound by the rules now. There is a new ruling coming out.

Q. Now, you testified in a case before Judge Fee not so very long ago in which we were interested, called the Siranger case, didn't you?

A. Yes, sir.

Q. Didn't you testify there that the tugs, river boats, and tows didn't feel bound by the rules to blow passing whistles? [153]

A. I did, and at that time they were not. The ruling has been changed since then. .

(Testimony of N. W. Stayton.)

Q. What time was that?

A. Well, I don't remember just when that went into effect. It has been only a short time.

Q. I want you before this trial is over to show me any change that has been made in the Pilot Rules about blowing passing whistles in the last five years, ten years.

A. I didn't say there was any change made in the passing whistles or anything of the kind. I said that these little diesel boats didn't come under the Inspection Service, and I think that is—the same thing—the statement I made in the Siranger case.

Q. I will have to look up the Siranger case and see.

A. In that case, Mr. Wood, the small boat was censored, but the Inspectors had no jurisdiction over him.

Q. Now, this dike that you have talked about along the Sauvie's Island shore there on the right-hand side is a dike built by the United States Government Engineers, isn't it?

A. I think it was. It was there before I come here.

Q. Don't you know it is a United States Engineers dike? A. I never looked it up.

Q. It is a riprap "L" on the bank, isn't it?

A. It is similar to some of the dikes that they did build. I don't know whether the City of Portland built it or whether the United States Engineers. [154]

(Testimony of N. W. Stayton.)

Q. Isn't it in the nature of a riprapping along the bank to protect the bank from washing?

A. I don't know whether that was built to protect the bank or whether that was built for a channel improvement.

Q. It is not a dike that sticks——

A. (Continuing) There is one on both sides of the river.

Q. It is not a dike that sticks out into the channel, is it?

A. Not what they call a spur dike, no.

Q. It is one that runs along parallel and close to the bank?

A. It runs along parallel with the bank with the exception of one place down in there below the range, it jogs out and comes out there probably a hundred feet further and then steps back and follows the contour of the bank along.

Q. Now, do you consider that this custom, which you say is so well known, overrides the Pilot Rules?

A. What custom is that you have reference to?

Q. The custom you testified to, the only one you have testified to.

A. I don't understand you.

Q. Well, I asked you whether you consider that this custom that you testified about overrides the Pilot Rules, overrides the law.

A. I think I have testified to two or three things, here.

(Testimony of N. W. Stayton.)

Q. I mean the custom that you testified to, that you say is well known to all river men, for tugs and tows to take the left-hand side coming up the river. That is the custom I am talking about. Do you consider that that custom overrides the law?

[155]

A. I think in the line of safety and practicability that we can get away—go away from the Pilot Rules. The Pilot Rules allows us that much leeway.

Q. That is a custom which the pilots have established among themselves, is it?

A. No, sir.

Q. Who has established it?

A. I don't know who established it. The pilots had nothing to do with it.

Q. Who has established it?

A. I don't know who established it. It was here when I first came here.

Q. Is there any official ruling by the Steamboat Inspectors permitting it, vessels passing to the left on Post Office Bar?

A. There is nothing by the—ruling by the Steamboat Inspectors that I know of that objects to it.

Q. Well, that is hardly an answer to my question. I want to know whether any official ruling has ever given sanction to it.

A. Well, now, I don't know that.

(Testimony of N. W. Stayton.)

Mr. Young: Pardon me. You are confining this question, now, to lights, are you, Mr. Wood?

Mr. Wood: Not at all. I am talking about the custom to pass to the left.

Q. What is the purpose of the forward range light on a boat? A. Sir? [156]

(The last question was read by the reporter.)

A. It is to line up with the mast light to—so as you can get the general direction of the vessel more clearly.

Q. You mean so you can get the general direction of the approaching ship more clearly, don't you?

A. No, sir. What would a range light have to do—if you had a range light aboard your vessel, what would a range light have to do with you approaching another vessel?

Q. Isn't the forward range light on a boat there for the purpose of indicating to the approaching ship the angle at which your boat is approaching?

A. It is for the approaching ship to tell the way your boat is approaching.

Q. That is what I mean, too. So that if a forward range light on your boat is obscured the boat that is approaching you cannot tell the angle of your approach as easily as if that light were lit, can it? A. Yes, sir.

Mr. Wood: That is all.

(Testimony of N. W. Stayton.)

Redirect Examination

By Mr. Young:

Q. Will you explain that last answer, please?

A. They have your side lights. Your side lights always show from straight ahead. They can see both side lights and the mast light, which a ship doesn't have to carry a range light unless [157] she is over 150 feet in length, and if she has got two side lights and a mast light why you can tell what direction she is going, if you can see both the side lights and the mast light.

Q. Captain, is an ocean-going ship subject to slide-slipping in the river the same as a river boat?

A. Side-slip?

Q. Side-slipping. Is the ocean-going ship subject to side-slipping as a river boat is?

A. Well, it depends upon how the construction and the draft of them. They do to a certain extent, too. Now, a vessel like an oil tank steamer, when they leave the dock up here they have a whole lot of slip to them, bow slip, because they are a good bit similar to a towboat towing a tow. They have no draft forward and they have about a 17- or 18-foot to 20-foot draft aft, standing right up on the end, and they have a big slip to them.

Q. Are you familiar with the steamer Pennsylvanian?

A. Yes, sir.

Q. Is that ship built in the manner that you have indicated the oil barges to be built, the oil boats to be built?

A. No, sir.

(Testimony of N. W. Stayton.)

Q. Well, is a ship such as the Pennsylvanian subject to side-slipping in the same manner as a river-going boat would be?

A. Not so much so; no, sir.

Q. And the reason for that is what?

A. Well, they have more draft in the water.

[158]

Q. Does the amount of side-slipping depend to some degree upon the amount of draft in the water? A. Yes, sir.

Q. Counsel was inquiring as to whether or not steamers are required to slow down when passing towboats and I think you stated there was no requirement of that nature. I will ask you, however, is there any practice of any sort that you know of with regard to ocean-going ships slowing down when they meet a river boat?

A. Well, we have been requested once—every once in a while as some vessel will go by that goes down and causes quite a disturbance, and then we will get quite a number of letters from different ones asking us to slow down, asking if we will use a little bit more precaution in slowing down and passing vessels, our tows, but there is no law, speed limit, that I have ever heard of or know of after you leave the city limits of Portland until you arrive in the harbor of Astoria.

Mr. Young: That is all, Captain. That is all.

(Witness excused.) [159]

CHARLES W. ACKERMAN,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Mr. Wood: If your Honor please, I gave notice that I may want to ask Captain Stayton about his testimony in that Siranger case. I want to take a moment to look at it. I don't want him to leave.

Direct Examination

By Mr. Young:

Q. What is your occupation?

A. Ship pilot.

Q. And how long have you been a ship pilot?

A. Since 1927.

Q. In what territory?

A. Columbia River.

Q. And what licenses do you hold?

A. Columbia River and tributaries, Ilwaco, The Dalles, and Oregon City.

Q. And have you held those licenses in the time that you have just indicated? A. Yes.

Q. Now, prior to 1927 what work were you engaged in? A. Well, on towboats.

Q. On the river? A. Yes, the river.

Q. The Willamette and Columbia? [160]

A. Willamette and Columbia rivers.

Q. And how far back had you been working on towboats? A. Since 1908.

Q. Then do I understand that since 1908 in some capacity or other you have been connected with the river boats or boats of some sort on either the Willamette or Columbia rivers?

(Testimony of Charles W. Ackerman.)

A. Yes, sir.

Q. In your work as a Columbia River pilot, do you have occasion to pilot any boats other than ocean-going ships? A. Yes.

Q. Sometimes river boats?

A. Yes. Well, yes. I will say once this year.

Q. Are you familiar with what is known as Post Office Bar near the mouth of the Willamette River? A. Yes, sir.

Q. And during the time that you have been on the Willamette River, what occasion have you had to go past Post Office Bar?

A. What occasions?

Q. Yes. How frequently?

A. Well, right now only two or three times a week now.

Q. And in the past how frequently?

A. Well, once every twenty-four hours.

Q. Captain, I will ask you to state whether or not in your opinion it is safe or practicable for river boats to go up or down the Willamette River in the vicinity of Post Office Bar by [161] following the west side of the river?

A. The west side? It is not practical, to my opinion, or safe.

Q. Will you explain your answer?

A. Well, if a towboat is coming up the west side and a ship coming down—we will take a log boat. That was the last one I was on.

Mr. Wood: I object to any testimony about log

(Testimony of Charles W. Ackerman.)

boats, your Honor. Log boats tow log rafts on a hauser at least 600 feet long trailing behind them, and the logs are perhaps sixty or a hundred feet back of the hauser. It is a long tow.

The Court: Ask the question again.

Mr. Young: Read the last question again.

The Court: Ask the question again.

Mr. Young: I asked the witness to explain his answer when he stated——

The Court: It is not safe or practicable. His answer having been it is not safe or practicable.

Mr. Young: Yes. I asked him to explain the answer, and the objection of counsel is to the witness's answer and not to my question.

The Court: Start it again, witness.

A. All right on the towboat business?

Mr. Young: Would your Honor mind having the reporter read the original question, please, and the answer?

The Court: Oh, he can go ahead. You are supposed to explain [162] why you think it isn't safe or practical.

A. Well, that towboat coming up there from any place along there, going around Gillihan's, the point above Gillihan's, if you have got two rafts on a tow line and ship comes down——

The Court: Mr. Wood wants to know what rafts have got to do with——

A. They are strung out a tow line.

Mr. Young: Q. Captain, will you confine your

(Testimony of Charles W. Ackerman.)

answer to the operation of river towboats which are pushing barges?

A. Well, even that, it is not practical to stay on the west side.

Q. And why?

A. On account of making—staying in that bight too far. They have to stay in too close. If there is any wind comes up to push them ashore, if a ship passes, and her back swell, you would call it, I guess, have more tendency of driving in that much further, and if those should happen to be awash or something like that, you—and you would go on there—you would punch holes or anything else in the barges, and from old time customs we are in the habit of figuring on them being on the east side of the river, towboats coming up and down.

Q. Now, the explanation which you have given, do I understand that that applies to towboats which are pushing barges? A. Yes.

Q. Now, do I understand that this custom which you have mentioned [163] in connection with your answer has existed for a long time?

A. Well, to my knowledge ever since I have been steamboating.

Q. And that runs back to 1908, does it?

A. 1908.

Q. Has that custom been a uniform custom?

A. Yes, sir.

Q. Now, is that custom confined to any particular kind of river boat, or is it general as to all?

A. As to all.

(Testimony of Charles W. Ackerman.)

Q. And has that custom confined to river boats that might be pushing barges as distinguished from river boats that are pulling log rafts?

A. No, to all boats.

Q. It applies to all river boats? A. Yes.

Q. To what extent would the presence of more than two boats, which might be attempting to pass Post Office Bar, be a factor in entering into the matter of whether it be safe or practical for a river boat to proceed upstream on the west side?

Mr. Wood: I object to that question, your Honor. It has no relation to the present case.

The Court: Sustained.

Mr. Young: If the Court please, we are discussing here a matter of a custom which is based upon factors of safety. The witness has testified that this is a general practice that has [164] existed, so far far as he knows, back as far as 1908——

The Court: And he says it is universal to all situations.

Mr. Young: To all situations, yes.

The Court: He does not need to go any further than that.

Mr. Young: Very well.

Q. Now, Captain, the danger which you were mentioning of the river boats colliding with the dike, as I understand it, is the one on the west side of the river? A. Yes, sir.

Q. And if the river boat is travelling up the east side instead of the west side, are there any of the

(Testimony of Charles W. Ackerman.)

dangers that you have mentioned then present to the river boat?

A. No, there is not. Of course, away at the upper end on the east side there is a little jetty sticks out up there, but that is on one spot, and the other jetty on the west side is, oh, I should say at least four thousand feet long.

Q. Now, to what extent is a wind a factor in regard to the matter of whether it is safe or practicable for river boats to go up the west side?

A. Well, an east wind—you have got to set off on account of the east wind blowing you toward the shore.

Q. What is the prevailing wind when there is one in that territory?

A. The wind that bothers you is an east wind.

Q. What wind generally prevails in that territory when there is a wind? [165]

A. Easterly.

Q. That wind, does that vary in velocity from time to time? A. Oh, yes.

Q. And how suddenly does the velocity of that wind change?

A. Well, I couldn't answer that.

Q. Well, does it change suddenly, or not?

A. Yes, at times.

Q. What is the effect of the easterly wind upon, or what would be the effect of an easterly wind upon a river boat proceeding upstream on the west side pushing barges ahead?

(Testimony of Charles W. Ackerman.)

A. Well, it would be the slippage, slipping sideways. You would have to hold out, and—meaning you would have to stay closer to the channel than you would on the other side.

Q. What do you mean by the “slippage”?

A. Well, the wind blows some ways light barges. They are light, even loaded barges, as far as that goes, with a house on, or more like a sailboat in front of you trying to steer it.

Q. Is an ocean-going ship subject to slippage in the same manner that a river boat is?

A. No, not to the same extent. No ways near.

Q. Why is that?

A. On account of the draft of the vessel.

Q. Now, you mentioned the matter of swell from an ocean-going ship. To what extent would the swell, or displacement swell, as it has been called, of an ocean-going ship proceeding downstream affect [166] a river boat which might be proceeding upstream on the west side of the river?

A. Well, the swell would—with a barge, we will say, you would—if she was making any swell at all you would have to slow down, and when you would slow down then the wind would be inclined to give that much more slippage, the less headway the more slippage. All right. Then when you would go to start up again, she would be going so lively you would have to head out straight across the river to get into the deep water again, and then if you did head out into deep water, another ship coming behind, I don't know where you would go.

(Testimony of Charles W. Ackerman.)

Q. Are you familiar with the term known as "kick water"? A. Yes, some.

Q. What does that mean?

A. Well, that is a current from the propeller.

Q. Does that current from the front of the propeller, would that have any effect upon the operation of a river boat going upstream on the west side at Post Office Bar? A. Yes, quite a bit.

Q. Will you explain your answer?

A. On account of the ship making that bend and swinging around there and a towboat coming up, that push water, we will say, from the propeller, the deeper it is the more current there is astern, there, and that hits your barges, will help you that much more to go towards—in the bight. [167]

Q. If the river boat were proceeding upstream on the east side of the river, would this displacement swell or kick water affect the river boat in the same manner? A. No.

Q. Why not?

A. Because the kick water would be going around in the bight, just the opposite from what you are.

Q. And what about the displacement swell?

A. Well, you would be further away from the vessel; that is, if she was going down the center of the channel you would be further away and you would stop. You would have more room when you go ahead, and still get out of the channel.

Q. How much room would you have to get out of the channel on the east side?

(Testimony of Charles W. Ackerman.)

A. Oh, on a 35-foot contour, they would have about four hundred feet along there.

Q. In other words, the easterly 400 feet of the river would be less than 35 feet in depth; is that right?

A. Yes.

Q. When you speak of a channel for ocean-going ships, what do you, as pilots, understand the channel to mean with regard to depth?

A. The deepest water.

Q. And that would be what in this instance?

A. Thirty-five feet.

Q. Would a river-going boat proceeding upstream on the west side [168] of the Willamette River opposite Post Office Bar be on the inside or the outside of the curve of the stream?

A. It would be on the long side—or the outside of the curve.

Q. And to what extent would that have any effect upon this matter of side-slippage in proceeding around the curve on the outside?

A. Well, inclined to make you slide to the long side, to the right.

Q. Would that factor exist in case the river boat were proceeding up the east side?

A. Well, no—some—yes, to some extent, but no way near as much.

Q. With regard to the matter of the east wind, is there any protection which the river boat would have against the east wind if it is proceeding on the east side of the river instead of the west?

(Testimony of Charles W. Ackerman.)

A. Yes.

Q. What is that?

A. Well, there is a bank, there, and then willows all along the shore are just high enough to cut off the wind on the barges.

Q. Captain, are you familiar with Article 25 of the Pilot Rules with reference to steam vessels in narrow channels? A. Yes, sir.

Q. Is it your undertsanding that that Article 25 gives to the steam vessel, at least an ocean-going ship, the absolute right under all circumstances to insist on port to port passages when going down past Post Office Bar? A. No. [169]

Q. Will you explain your answer?

A. Well, when safe and practical, it does, but if there is other reasons to make it safer to pass starboard to starboard, then the practical thing is the safest, which—which we are cautioned to do and even rules give you that leeway.

Q. And do those rules exist in your opinion in the case of a passing of a river boat by an ocean-going ship at Post Office Bar? A. Yes, sir.

Q. Now, if you were piloting an ocean-going vessel downstream in the channel of the Willamette past Post Office Bar in the nighttime and you saw approaching on the east side of the river two mast lights with either a red or green side light, together with at least two white lights forward and near the water's edge, what would those lights indicate to you as to the identity of the approaching vessel?

(Testimony of Charles W. Ackerman.)

A. Well, I would figure the towboat with barges alongside or ahead of it.

Q. And is that generally known by pilots in the Columbia River area? A. Well, yes.

Q. Is the placing of white lights on the forward ends of barges which are either on the nose of a towboat or on one or the other sides, a practice with regard to lights? A. Yes.

Q. How long has that practice existed, to your knowledge? A. Well, ever since 1908.

Q. Has that been an uniform practice with regard to the manner of [170] lighting barges which are being towed by river boats?

A. Yes, sir.

Q. To what extent has this practice that you mentioned of river boats using the east side of the river at Post Office Bar instead of the west side, to what extent is that practice known by pilots in this area?

A. The pilots—I wouldn't know. All I know is to my knowledge as a pilot since 1927, and as a towboat man since 1908.

Q. Is the custom and practice generally known, do you know? A. Yes, it is.

Q. How frequently, to your observation, is the Willamette River in the vicinity of Post Office Bar used by towboats and barges?

A. I think there are more towboats will pass between Multnomah Channel in the Willamette and the mouth of the Columbia River than any other given point on the Columbia or Willamette rivers.

(Testimony of Charles W. Ackerman.)

Q. And to what extent does it happen that there may be more than one towboat there with barges at the same time?

A. Well, on account of that being such a point where there are so many must pass.

Q. And these factors of safety and practicality that you have referred to, do they apply with increasing importance in cases depending upon the number of boats that may be there at any particular time? A. Yes, sir.

Q. The greater the number of boats the greater the importance of [171] applying these safety factors of safety which you refer to?

A. Yes, sir.

Q. What is the usual speed of ocean-going ships travelling downstream past Post Office Bar?

A. Well, that depends on the ship and draft. I would say from six knots to whatever speed they want, twelve knots.

Mr. Young: You may cross examine.

The Court: We will take the morning recess here, but I want to ask you, first, Mr. Wood, do you have expert testimony along this line? I suppose you have.

Mr. Wood: Yes.

The Court: How many do you expect to call on a side?

Mr. Young: I have two more, your Honor.

The Court: Well, our rules provide for three, and it seems to me in the hot weather two would be enough. This is your second man.

(Testimony of Charles W. Ackerman.)

Mr. Young: Our local rules limit them to three on a side, your Honor, and we always limit them to three in condemnation suit. I mentioned in the opening statement yesterday that I would have five or six——

The Court: I know you did, but am I estopped because I didn't bring up the point then?

Mr. Young: I would say that I was possibly misled by the failure of anyone to make a comment about it. I did not understand that in an admiralty case the reference has an application. I think that has been—— [172]

The Court: All right. You call six. We might as well stay here all month.

Mr. Young: I don't want to take up the time of the Court unnecessarily.

The Court: Mr. Wood.

(Whereupon at 9:50 a recess was taken.)

Cross Examination

By Mr. Wood:

Q. Captain Ackerman, you were a towboat man from 1908 to 1927, weren't you?

A. Yes, sir.

Q. And from that you went into the piloting, did you? A. Yes, sir.

Q. Are you a member of the Columbia River Pilots Association? A. Yes, sir.

Q. Most of you pilots in that association have graduated from the towboat business into the pilot business, haven't you?

(Testimony of Charles W. Ackerman.)

A. Yes, sir; the majority.

Q. You, nearly all of you are old towboat men, aren't you? A. Yes, sir.

Q. Now, you spoke of this old-time custom for towboats there to come up on the east shore. How did that custom originate, do you know?

A. I haven't any idea.

Q. Was it something that just sort of grew up among the pilots [173] and towboat men?

A. No, from experience I think it grew up. Somebody has had accidents over and seen it wasn't practical or safe around there.

Q. It just grew up in the olden days between the towboat men and the steamers.

A. Just as a guess I would imagine so.

Q. It has never been recognized by the Steamboat Inspectors, has it?

A. Well, not to my knowledge.

Q. Well, do you know that they have condemned towboats and found their pilots guilty for coming up there on the left-hand side?

A. Well, I heard Captain Reed lost his license for one day. That is the only case I know of. .

Q. That is the only one you know?

A. That is the only one I know, yes.

Q. Do you know of the case of the Modoc and the Twin Point having a collision?

A. Twin Point. I never heard of that boat. That wasn't on the Columbia River. There has never been a boat by that name.

(Testimony of Charles W. Ackerman.)

Q. Well, these were small boats.

A. It must have been.

Q. Now, these stern-wheel river boats, such as the Barry K, handle well, don't they, handle easily?

A. Barry K? I never was on her.

Q. What?

A. I was never on the Barry K. [174]

Q. I am speaking of these stern-wheel river steamers, generally, as a class.

A. Towboats handle well, yes.

Q. The fact that they are stern-wheelers and the position of their rudders in relation to their wheel makes them handle readily and quickly, doesn't it? A. Yes, they do.

Q. And many of them in fact have monkey rudders, don't they? A. Yes.

Q. Do you know whether the Barry K has monkey rudders? A. Yes, she has.

Q. That means an additional set of rudders, does it not?

A. Yes. I will take that back. They were on the Barry K when she was called the Portland; used to be the Lewiston.

Q. Inasmuch as I have referred to them, explain what monkey rudders are.

A. Monkey rudders are from one to four on the river, astern of the wheel to help when going ahead, to help steer, and they are logically built for the purpose of towboats, to help steer before it really gets headway, to help steer.

(Testimony of Charles W. Ackerman.)

Q. This type of Columbia River towboat, stern-wheel boat, has been especially designed and built because it is a powerful, well-handled boat to handle tows on this river. Isn't that a fact? I am speaking of them as a class. A. Yes. [175]

Q. Now, have you handled tows similar to this one, the Barry K? A. Yes, sir.

Q. Do you know what kind of a tow she had this night?

A. Well, I have an idea what kind.

Q. What is your idea? I just want to see if you are right.

A. Well, just one of those steel barges with about a 10- or 15-foot house on, drawing about three or four feet of water, flat bottom. I think that—

Q. And loaded with paper?

A. Well, that is why she would be adraft. She would only be drawing maybe eight, ten, or a foot if she was light.

Mr. Young: If the Court please, I think if this question is to be asked this witness, the witness is entitled to know the testimony already in the record as to what the dimensions of the Barry K and her barges were.

Mr. Wood: I do, too, if he wants to know. I think he does know.

The Court: You state them, Mr. Young.

Mr. Young: The evidence in the case, your Honor, shows that the Barry K, itself, was about 165 feet long over-all, that she had one barge on

(Testimony of Charles W. Ackerman.)

her nose and another barge on her forward port side. The barges drew between four and five feet of water each. They had deck houses extending their full length, which were approximately twenty feet above the level of the water.

The Court: Q. Captain, are you listening?

A. Yes, sir. [176]

The Court: This is all for you.

Mr. Young: And the Barry K herself drew two feet eight inches. Her own deckhouse extended most of the length of the Barry K's hull on the lower deck and the superstructure ran up as high as the top of the pilot house, which was about 34 feet above the water's level.

Mr. Wood: Q. Captain Ackerman, I want to satisfy my exacting friend, here, and give you every benefit of all of the information possible. There is a photograph of the way——

The Court: I think you gentlemen every now and then get into your heads that this is a jury over here. I think maybe we would get along here if we would set them some place else.

Mr. Wood: Very well, your Honor.

Q. I want to know, with a tow made up like that, how much effect a ten-mile breeze would have from the east?

A. It would have quite an effect—that is, if it was a beam wind.

Q. How much would you have to hold the tow out sort of diagonally into the channel with a boat

(Testimony of Charles W. Ackerman.)
of the power of the Barry K to conteract the breeze?

A. Well, it would take very near 40 to keep her a straight line, or 45 degrees practically to keep her on a straight course.

Q. You would have to hold it out about 45 degrees?

A. Yes, to keep her on a straight course.

Q. But if you held her out 45 degrees you could keep her out there all right? [177]

A. If you didn't have to slow down you could, I imagine.

Q. Suppose you had to slow down. You would just increase the angle and still hold her off the bank?

A. Increase that angle quite a bit, practically go head on in the wind.

Q. And if you did that, you could hold her indefinitely off the shore?

A. I wouldn't say that indefinitely. That is from my experience. You would try it that way and see what you could do.

Q. Well, Captain Ackerman,—

A. The wind may increase by that time.

Q. I am talking about a ten-mile breeze.

A. Oh, it is going to stay that way.

Q. Now, the more you quartered her into the wind, the more you would head into the wind and the less resistance you would expose to the wind. That is true, isn't it?

A. Yes, that is true.

(Testimony of Charles W. Ackerman.)

Q. Now, could you slow that boat down and head into the wind and remain there as long as you wanted to without going into that bank?

A. Well, no.

Q. Why not?

A. Because on account of you would be going along there. You never heard—saw a wind that will stay indefinitely ten miles. There will be pockets, —like an airplane or anything else, there is pockets. The same thing here. [178]

Q. Let me ask you this: If the wind increased a little in the pocket, you could speed up your boat a little and hold her off the bank, wouldn't you?

A. I would hate to bet any money that I could hold her in one spot.

Q. I didn't say one spot. I say keep her off the right-hand bank.

A. Oh, yes; by increasing my speed and one thing and another, yes.

Q. In fact, the testimony is that the Barry K was pushing this tow up against the current, one-mile current, at six miles an hour, so that would indicate she had considerable power to handle her tow, would it not?

A. Yes, she had power for that.

Q. Now, if the Barry K and her tow, as there shown, had chosen to come up on the right-hand side under the conditions as they have been described of a ten-mile breeze from the east and a one-mile downstream current, how close could she

(Testimony of Charles W. Ackerman.)

have kept in to the right-hand side and still proceeded up the river safely?

A. Well, we will say two hundred feet. That is providing she don't have to stop or anything like that; that is just keep a-going and hold her out there.

Q. Now, what part of her do you mean when you say two hundred feet?

A. Well, I would say—be prepared for safety's sake—I would say the stern, or say even the wheel-house, two hundred feet out, or three hundred feet, stern about two hundred feet off.

Q. Stern about two hundred feet off?

A. Yes. [179]

Q. Now, how much clear water would that leave on her port side for a downcoming ocean steamer to pass in the deep channel?

A. How much—on her port side?

Q. Yes.

A. She is coming up now. She is on the Swan Island side, or I mean the Sauvie's Island side. That's right. That is what you are saying.

Q. Yes.

A. To leave the ship come down her port side that would allow her practically the whole channel, five or six hundred feet.

Q. Would leave the downcoming ship a whole channel?

A. Yes, it would. A 35-foot channel.

Q. So if the tug and tow could proceed safely

(Testimony of Charles W. Ackerman.)

in the way you have described, keeping her stern two hundred feet off, and the ship had almost the whole channel to come down in on the tow's port side, they could have made a safe and practicable passage, couldn't they?

A. This is nighttime or daytime?

Q. You understood this was at nighttime.

A. No, I would hate to be coming down there with a ship and just see a green side light only across there. I would begin wondering what he was trying to do. That is if I am on the ship. And if I am on the towboat coming down there, you are two hundred feet off, and that wind blowing, you don't know whether he has to stop on account of breaking or parting lines and one thing and another, and if you stop a minute or two you are going to drift, [180] the barge in front is going to carry away, and you can't keep her headed in while you are stopped. That is practically impossible.

Q. I thought we agreed a moment ago you could slow down——

A. You stop time and time again. I will venture to say that eighty per cent of the time you stop with a towboat and barges if there is any swell to amount to anything on the ship with a towboat, on account of parting lines.

The Court: What is that expression he uses?

A. Parting lines.

The Court: You mean breaking?

(Testimony of Charles W. Ackerman.)

Mr. Wood: He means breaking the lines, yes.

Q. Would there be an occasion for the tugboat to stop there? A. There may, yes.

Q. Why?

A. On account of the swells from the ship.

Q. Well, if the ship does her supposed duty she slows down, herself, to avoid making a swell, doesn't she? A. Well,—

Q. Answer that question. Isn't that the rule and practice? If the steamer has reason to anticipate that her swell is going to injure a tow, isn't the practice for the steamer to slow down while passing? A. Not always.

Q. Isn't it the practice?

A. It all depends on what your ship is. Now, some ships going [181] at six knots, which you don't have to go slower than that,—there is no ruling to that effect. All right. Keep your own steerage. Some ships going slow have a swell or suction, more so; others can go twelve knots and no more swell than one going six. So you can't go according to that.

Q. Well, I don't think you have answered my question. Perhaps you have tried to. I asked you this: If a steamer is going down the river with such draft and speed that she is throwing a displacement wave which may part the lines on a tug and tow she is passing, isn't the practice for the steamer to slow down and avoid that contingency?

A. All right. We will say she does slow down and still there is a swell. Then what?

(Testimony of Charles W. Ackerman.)

Q. You are not answering my question.

A. I think I am.

Q. Isn't it the practice for them to slow down?

A. To slow down, yes; to slow down.

The Court: As old towboat men, these pilots are no doubt especially considerate that they have now become deep draft pilots.

Mr. Wood: Yes, no doubt they are. They all do it.

Q. Now, Captain Ackerman, what is it about the Barry K and her tows that makes them susceptible to this wind resistance?

A. They are all that way with the same tow—that is, practically speaking, the average towboat. Some a little more than others.

Q. What is it that makes them so? [182]

A. On account of the draft.

Q. And does the kind of barges they tow have anything to do with it?

A. Yes, the types of barges have, yes.

Q. What is it?

A. If they are a flat-bottomed barge, they are inclined to slide more.

Q. You will admit with me, won't you, that the channel here at this place we are talking about is 800 feet wide and 30 feet deep? A. Yes.

Q. And you know, of course, the law requires vessels to pass port to port in narrow channels where it is safe and practicable to do so? You know that? A. Yes, sir.

(Testimony of Charles W. Ackerman.)

Q. Now, do you mean by your testimony that the Western Transportation Company places afloat on these waters——

A. What?

Q. Do you mean that the Western Transportation Company puts afloat on these waters a tug and her tow so constructed and of such power that she can't obey that rule in an 800-foot wide channel? Is that what you mean?

A. In an 800-foot wide channel?

Q. Yes.

A. Yes, they can obey it in 800 feet; yes.

Q. That is what we have, here.

A. Yes, they can do it in that whole channel; they can keep her [183] under control.

Mr. Wood: I think that is pretty near the end of this case, it seems to me.

Q. I mean they can do it safely?

A. You are using the whole 800 feet, you understand.

Q. No, using the whole 800 feet.

A. Yes.

Q. If they do that, there is no reason why they can't pass port to port safely and practically, is there?

A. Yes, you cannot pass safely. It is not practical and not safe.

Q. On account of the character of the construction of the tow?

A. Yes.

Q. You will admit, won't you, that these tugs and tows, like this one, are easier to handle than an ocean steamer 420 feet long, won't you?

(Testimony of Charles W. Ackerman.)

A. Well, it depends on the quarters you are in. As far as with no headway on, I will say a ship is easier to handle in a wind, the same wind, understand, ten miles.

Q. Well, I am not talking about "no headway on." We are talking about general navigation.

A. If you keep a-going full speed?

Q. Or half speed. Isn't the tug and tow more maneuverable than a heavy, 420-foot-long ocean steamer?

A. Yes; at half speed, yes.

Q. And isn't it also true that a boat going upstream against a [184] current is always more maneuverable than one coming downstream with the current?

A. Yes, sir.

Q. That is admitted by all, isn't it?

A. Yes, I think so.

Q. And it is your idea, then, that a partially laden ocean steamer like the *Pennsylvanian* coming down through that channel and seeing the red light of a towboat coming up a mile away should elect to pass to the towboat's left and go into these dangers that you describe along the dike with the current behind them. Is that what you think the steamer should do?

A. No. The steamer should stay in the channel. That is what they dredge the channel for. That is where she should stay, if possible.

Q. What part of the channel?

A. The deepest part.

Q. What? A. The deepest part.

(Testimony of Charles W. Ackerman.)

Q. You will admit, won't you, that this 30-foot channel is the same depth clear across?

A. I know, but why did they dig a 35-foot channel, if not use it?

Q. Isn't the 30-foot channel the same depth clear across?

A. Well, the 30-foot channel is 30 foot. It should be.

Q. Clear across. Which part of that channel should the ship keep which is coming down? [185]

A. Well, I would say to get exactly the middle of that channel he should stay to Sauvie's Island side, favor Sauvie's Island side.

Q. You think that even though she sees the red light of a towboat coming up a mile below her, that she should elect to take the left-hand side, do you, in the middle of the night?

A. Yes, the main—of the channel, now, you are taking the whole thing in.

Q. And what would you expect the up-coming towboat to do?

A. That would be giving the ship the middle of the whole channel.

Q. What would the tugboat be supposed to be doing?

A. You are expecting him to be hugging the east side.

Q. Of what? A. Of the river, there.

Q. The east bank? A. The east bank, yes.

Q. Under the protection of those willows?

(Testimony of Charles W. Ackerman.)

A. Yes, sir.

Q. And completely out of the ship channel?

A. Nearly so. We don't need the whole ship channel to get by a ship.

Q. What do you mean? Do you mean that the tug and tow should be partly out in the shoal water or partly in the deep ship channel?

A. They try to hold in the shoal water.

The Court: What water was the *Pennsylvanian* drawing?

Mr. Wood: The *Pennsylvanian*? [186]

The Court: Yes.

Mr. Wood: I think she was drawing nineteen feet. That will appear later. Somewhere around there, eighteen or nineteen.

Mr. Young: I think, your Honor, the evidence will also show, however, that the *Pennsylvanian* was carrying only partial cargo at the time.

Mr. Wood: That is true.

Q. How close does a towboat have to get into these willows to receive any shelter from them as against the wind?

A. Well, you will receive some two or three hundred feet away, some resistance from the wind. The closer, the more protection.

Q. I know, but I want to know the outside limit. How far out from those willows does she have to get before she loses all of their protection?

A. You will have to get somebody more technical terms than I have got to figure that out.

(Testimony of Charles W. Ackerman.)

Q. From your experience you don't know?

A. From my experience I would say three hundred feet.

Q. If she was three hundred feet out from those willows, she would be completely in the shoal water, wouldn't she?

A. In a 35-foot contour, yes, she would. I thought you were talking about thirty feet.

Q. If she were out anywhere in the dredged channel she would be getting the full force of that wind, no matter which side of the dredged channel she was on. Is that what you mean? [187]

A. No, no, I don't. There is always a little lee. The further we get away the less——

Q. All right. I will go back to the lights a minute. Do you regard the front range light of a steamer or a river boat as of any importance?

A. Well, I use them on ships, yes, but—the side light is the main thing.

Q. Well, let's confine ourselves to river boats. Does a forward range light have any importance on a river boat?

A. Well, yes, some, if you have got it where you can see it.

Q. What is it?

A. Well, it lines your—the center of your boat up.

Mr. Wood: I paused. I wanted your Honor to hear this.

The Court: Yes, sir.

(Testimony of Charles W. Ackerman.)

Mr. Wood: Q. The front range light, then, helps the opposing ship coming down to meet you to determine your course, does it not?

A. Yes.

Q. And the rules require a front range light for that purpose, don't they?

A. Well, if there is a barge ahead I don't know where you could put that thing to line up.

Q. Well, that is not the point. The rules require a front range light, do they not?

A. Yes. [188]

Q. And with a front range light on a boat, the approaching boat can determine the course of the one she is approaching much more exactly than she can by just looking at the other ship's side lights, can't she?

A. Yes. More accurately, yes.

Q. In fact, if all you see of an approaching ship is her red light and two vertical lights, you can't tell within ten points which way she is coming, can you?

A. Let's see. Now, wait. We are getting technical. We are getting down to points, now.

Q. Well, you are a technical pilot.

A. Seeing the red light, you say? Well, you could see the red light from any angle, up, from straight ahead, to ten points. You could be clear aft of the red light. But you can size up the tow and range things up a little bit with the tow if you have any local knowledge.

(Testimony of Charles W. Ackerman.)

Q. Well, I am not relying on the tow lights yet. It is a fact, isn't it, Captain, that the red and green lights of a ship, called sometimes the side lights, are supposed to show from dead ahead to two points abaft the beam? A. That's right.

Q. That is right, isn't it? And they are supposed to be screened so that they will not show across the bow of the ship they are on. That is right, is it not? A. That is right. [189]

Q. And the only arc that they will show through is an arc of ten points from dead ahead to two points abaft of the beam? A. Yes.

Q. That is right. So that if the Pennsylvanian in this case coming down saw the red light of the Barry K and her vertical towing lights and no front range light, she could not tell within ten points what the course of that approaching boat was, could she?

A. No, but it is up to the approaching ship to try to judge how far the ship is off the channel to the right or to the left, because they are coming obliquely to each other, which happens frequently.

Q. Now, the front range light which is required by the rules is for that very purpose, to enable the approaching ship to determine more exactly the course of the ship that she is approaching, is it not?

A. Yes, that is right.

Q. What? A. Yes. Right.

Q. Of course it is.

A. But, now could I say something?

Q. Yes.

(Testimony of Charles W. Ackerman.)

A. We will say that you had that light on this towboat. What good will it do the ship? You couldn't see it. It will just blind the pilot on the towboat. That is all it will do, because of the reflection from the barge back into his face. [190]

Q. I should suggest that he ought to raise it up so the other fellow can see it.

A. The Government rules that——

Q. You can raise it if you raise them both.

The Court: What did you say?

Mr. Wood: If your Honor please, the rules require these range lights to be so placed, one, the rear light, I believe it is, a certain height above the front light, and the witness has just been suggesting that they couldn't raise this front range light, and I say they could raise it. All they have to do is raise their rear range light. So long as they are in a proportionate height they comply with the rules. Isn't that right? A. Yes.

The Court: And that will be your claim, which you seriously make in this case?

Mr. Wood: We make a claim that the front range light, had it been lit and showing on the Barry K, would have enabled us more exactly to determine her course.

Mr. Young: If the Court please——

The Court: Wait a minute, if you please. And even though, as I understand, the custom is not at all to maintain a range light where there is a tow like this one that interfered with the vision?

(Testimony of Charles W. Ackerman.)

Mr. Wood: I have never heard until this moment that there was a custom not to maintain a range light, but the rules absolutely [191] require it.

Q. Now, is there a custom?

A. There is. I don't believe there is a towboat man in here or otherwise that has seen anything else in the Columbia River, and I am covering a lot of territory when I say that.

Q. You mean it is a practice not to maintain a range light?

A. To put it on each side of the barge, outside corners.

Q. I am talking about the range light.

A. That is what I mean. There would be so many lights you wouldn't know what to do with it.

Q. We all know what a range light is, don't we?

A. Yes.

Q. One required by the rules. Is it the practice of you towboat men not to keep a range light burning?

A. Sometimes, yes, we keep it burning, but it is no good to you.

Q. And sometimes you do not. Is that it?

A. Well, I—when it is hazy weather so a reflection from that light comes, I don't use it. I turn it out.

Q. Now, let's talk about the lights that were on the corners of these scows. They are kerosene lanterns, according to the testimony, hooked on to the

(Testimony of Charles W. Ackerman.)

corners of those scows, and you say that is in accordance with long-standing custom here in the river? A. Yes.

Q. Is there anything in the Pilot Rules or the Inspectors' Rules that justifies that? [192]

A. I don't know. I believe there is a ruling you must have a light on each outer corner of a barge. I believe there is something of that kind.

Q. You don't know what the rules are about that?

A. Well, not exact, no. I am sorry. I should know.

Q. Well, there is no use asking you that.

The Court: Maybe it is like our business. He would have to look it up.

Mr. Wood: Q. You will admit that ocean steamers pass in this place port to port and always have, will you not? A. Yes, they have.

Q. And when towboats with tows meet there, how do they pass?

A. They stay—they pass port to port on the east side of the channel.

Q. You mean completely out of the channel?

A. Well, or as nearly out as they can get. Now, I will have to go back to towboats to explain why they do that. Could I do that?

Q. You can explain anything if you want to.

A. Well, if you have a raft man coming down there and try to hold your side of the channel, which you say go down there——

(Testimony of Charles W. Ackerman.)

Q. Excuse me, Captain. I don't want to prolong this, and neither does the judge. We are not interested in rafts. A. All right. Skip it.

The Court: You might develop, though, how long up and down the river is this supposed dangerous area, there. Do you know what [193] I mean, "up and down the river"?

Mr. Wood: I shall be glad to have your Honor ask him any such questions as that.

The Court: You ask him. You are doing fine. We have heard a lot about the width of the river. Just consider that a special danger condition zone in there. What is the extent of it?

Mr. Wood: Q. How far up and down the river, Captain Ackerman, would you consider this hazardous area that you have described around Post Office Bar to continue?

A. Well, from the mouth of the river to about here (indicating). There is a slough coming right there to here (indicating). There they can spread out and there is more water on all sides from the mouth of the river up to that point.

Q. From the mouth of the river up to a place marked—— A. Multnomah Channel.

The Court: Just put your finger where the collision occurred.

Mr. Wood: Right there?

Mr. Erskine B. Wood: About two-thirds of the way into the area from the mouth of the river, would you say?

(Testimony of Charles W. Ackerman.)

Mr. Wood: Of course, the mouth of the river is away down here. He describes it as from the mouth of the river up to the place on the chart where Captain Reed marked the position of the Pennsylvanian when he first saw it.

A. That is West Multnomah Channel, there.

Mr. Wood: Yes, it is west of Multnomah Channel Entrance fixed white. [194]

The Court: Where, Mr. Young, according to your theory, do the towboat men begin to take to the left coming up the river?

Mr. Young: From the mouth of the river up to and beyond this bend in the stream.

The Court: Quite a few miles.

Mr. Young: It would probably be two miles to two miles and a half upstream, I should say.

Mr. Wood: From where?

Mr. Young: From the mouth of the Willamette.

The Court: And to the city limits, practically.

Mr. Young: Close to the city limits, your Honor.

Mr. Wood: That is all.

Redirect Examination

By Mr. Young:

Q. Captain, what has been the custom from your observation as to the course of travel of a river boat which is coming down the Columbia River and making the turn into the Willamette to proceed upstream? At what point does that river boat proceed over to the east shore, if at all?

(Testimony of Charles W. Ackerman.)

A. Well, it stays on the east side right around from the mouth on up.

Q. And in the case of river boats coming upstream from down below the mouth of the Willamette, what is their practice with regard to the course they take in going up the Willamette?

A. Well, they stay to the left of the main channel up to the [195] mouth and then continue to the left coming up river, up in the Willamette, all the way up to practically West Oregon.

Q. And do I understand this practice of the use by river boats of the east side of the channel then runs from the mouth of the Willamette up to a point near the West Oregon mill? A. Yes.

Q. And would that include this large bend in the river that the Court has seen on the map?

A. All of that.

Q. Includes all of that? A. Yes.

Q. Counsel asked you a question in response to which you said that——

The Court: What is Post Office Bar? Is it a bar that still exists, there?

Mr. Wood: Oh, it was an old place in the river that used to shoal up, and they dredged the channel through it.

The Court: No longer a bar there?

Mr. Wood: No.

Mr. Young: Q. May I inquire of the witness, your Honor, who is an expert, what is your understanding about the position of Post Office Bar?

(Testimony of Charles W. Ackerman.)

A. Well, the position—there is still a bar out there. They keep widening this channel. They will have to take that whole island out to take the bar out. There is kind of a peninsula, [196] is what it is, has been filled up, and that is the Post Office Bar.

Q. Measuring along the stream, what would be the approximate length of the Post Office Bar?

The Court: The whole front of Sauvie's Island?

A. I would say two miles.

The Court: Q. The whole front of Sauvie's Island?

A. No, no. Opposite Sauvie's Island. The bar is along here (indicating).

Mr. Young: Loud enough so the reporter can hear, now.

A. Here. It is right along this, here. Post Office Bar No. 3 light.

Mr. Young: Q. You are pointing now to an island?

A. Well, it is an island, there, but there is no water through there now.

Q. But on the map it appears to be an island?

A. Yes.

Q. And "P. O. Bar 3 F. W." appears on one side of that apparent island. Is that right?

A. Fixed white light on it, yes.

Q. Do I understand that Post Office Bar is within substantially the limits of that island?

A. Yes, approximately.

(Testimony of Charles W. Ackerman.)

Q. And the bar is on the east side of the river. Is that right? A. Yes.

Q. In answer to a question put by counsel, you intimated that eight hundred feet of channel would be adequate for an ocean-going ship to go downstream. Did you mean by that that it would [197] still be safer, practicable, however, for a river boat to pass the ocean-going ship if the river boat were going on the right-hand side?

Mr. Wood: I object to that question.

The Court: He left me alone.

(The last question was read by the reporter.)

The Court: Your objection, Mr. Wood?

Mr. Wood: I think the question is unduly suggestive. I think the witness's answer is clear and complete as he gave it to me. He said they could pass safely and practicably.

A. You didn't say "pass." You said "wide enough for a ship to go down."

Mr. Young: That is exactly the point I want to make out.

The Court: It is cleared up.

Mr. Young: Q. Did you or did you not mean to indicate that it would be safe for the river boat and ship to pass at that point with the river boat being on the west side of the stream?

A. No, it wouldn't be safe.

Q. With reference to the matter of the lights on the Barry K, the evidence has indicated that there were two lights on the forward ends of the

(Testimony of Charles W. Ackerman.)

outside ends of the two barges forward, white lights. They were about six feet, I believe, above the tops of the barges, themselves. Now, assuming that you were on a river boat, or I mean an ocean-going boat, going downstream, and you saw the two mast lights of a boat with either the red or the green [198] light in addition, and then beside that you saw these two white lights forward and near the water's edge, would the existence of those white lights assist you in determining the course of the up-coming boat?

A. You got that so muddled up I can't understand it. You said a ship with those two white lights on the side of that. They never have it.

Q. I am assuming you are on a ship going downstream. A. Yes, I would.

Q. And you are met by this Barry K, let us say, lighted as I have indicated. Would the two forward lights that are on the barges near the water's edge be of any assistance to you in determining what the course of the Barry K was?

A. Yes, it would.

Q. And will you explain your answer?

A. Well, the further apart these two white lights would be, it would show that you were getting that much closer to meeting head and head, if you didn't see the range lights, see, just the side lights, because you would be on a right angle, if they—if you saw the red light and saw those two lights bearing your line, that would show you very near

(Testimony of Charles W. Ackerman.)

crossways of it. The wider they spread the closer head-on you would be.

Q. The questions which were asked you by opposing counsel in regard to the effect of a breeze from the east upon the Barry K with her tow were based upon his statement of evidence that the [199] breeze was a ten-mile breeze from the east. There is also evidence of Captain Reed that the breeze was from ten to fifteen miles an hour. Assuming that the breeze were, say, fifteen miles an hour, what difference, if any, would that make in your statement to the Court about the effect of the breeze upon the Barry K?

A. Well, the more breeze, the more you would have to head into it, and the more speed you would have to head into it.

Mr. Young: That is all.

Mr. Wood: If your Honor please, I don't like to consume your time, but the witness's last answer compels me to go back over something.

Recross Examination

By Mr. Wood:

Q. Now, Captain Ackerman, you told me that the tug and tow could with safety that night, with that breeze prevailing, call it ten or fifteen miles an hour, have come up on the right-hand side of that channel providing she kept her stern off of the right-hand bank a certain distance, did you not.

A. The more wind, the further you stay away, with safety.

(Testimony of Charles W. Ackerman.)

Q. I am going to assume, now, the maximum—let us say a fifteen-mile wind. How far would that tug and tow have to keep off of that right-hand bank to come up on the right-hand side safely?

A. Well, I would try to add a little more distance in there—say another fifty or sixty feet, if I could.

Q. How far are you going to stay now? [200]

A. 250 feet at the least, say.

Q. She would have to come up 250 feet off the dike?

A. Her stern.

Q. Off the dike?

A. Yes.

Q. And she would have to put her bow out into the channel further?

A. Yes.

Q. How far out into the channel would her barges extend then?

A. Well, now, you know the figures as well as I do. You can figure from the stern, 250 feet from the stern, and then the length of your tow and barge, whatever that would be.

Q. All right. Then you will have to tell me what angle she would have to come up there.

A. She is coming up there with a 45, we will say.

Q. And she could do that with perfect safety?

A. If she would keep a-going, yes.

Q. How much room would that leave for the ship coming down?

A. Oh, I don't know. We will say four or five hundred feet.

Q. Now, you say if she kept a-going—

(Testimony of Charles W. Ackerman.)

A. Yes.

Q. —if she kept a-going she could control her course just the way she wanted to, couldn't she?

A. Anyway she wanted to? No.

Q. If she kept going?

A. Well, to a certain extent, yes, she could. [201]

Q. If she kept a-going, and a powerful tug, why would she have to keep her stern 250 feet off of the right-hand bank?

A. Well, because you head out a ways and then you can't keep—you have got to make headway to go upstream. You will stay that way. Then if you start settling in and then swing out again, try to keep that up, make headway up river as well as across, to keep off.

Q. Do you mean that a vessel like the Barry K with her tow making six miles an hour has to keep 250 feet off of that dike with her stern, making six miles an hour?

A. Well, no. I wouldn't say she had to keep that far off, but if anything had happened, the least little thing, you are supposed to use a little precautions, aren't you? You have to be out where you figure a little bit of safety, and if there is a ship coming down you would have to try to get squared around further, if possible. That is why it is not safe to go over there. That is my argument on that.

Q. Do you know the barges after this collision did drift right into this dike?

A. I don't doubt it.

(Testimony of Charles W. Ackerman.)

Q. It did not hurt them, did it?

A. Well, I don't know, but what say those piling were up and you was that much closer so your barges would light on top of these piling and bang up and down?

Q. I don't know the character of the piling. [202]

A. They are sharp piling along there, about a foot in diameter, I should judge.

Q. At what stage is that piling out of water.

A. Let me see. I am just going to guess. About three or four feet; just flush, I think, at three or four feet.

Q. On the 1st of February—

A. I am just guessing. I wouldn't give a definite answer on that.

Q. On the 1st of February, about how would it be?

A. I wouldn't say. I don't even know what the stage of the river was then.

The Court: There was some testimony the other day about meeting a number of log rafts in there. Was it meant by that that they were moored in there, or that there was a movement up and down the stream in there?

Mr. Young: Moving up and down, your Honor.

The Court: It was not this witness; somebody else. Do you want to ask him any more?

(Testimony of Charles W. Ackerman.)

Redirect Examination

By Mr. Young:

Q. To what extent have you observed the use of the river between the mouth of the Willamette and, let us say, the city limits of Portland by towboats that are pulling log rafts?

A. Well, you have got to stay—you have to, in other words, stay—if there are two steamers, say, one following the other, we will put it, and you are above Gillihan's on the right-hand side coming up, you get in to let the first ship go by and then you will try to swing out, if possible, to get your raft away from [203] the beach, but I doubt if you could do it, and then to come in for the second one you have to stay there so long that your rafts are grounded on that point, the tail end of your raft grounds. I could show you by a little pencil easier. I could explain it to you.

The Court: You are not my witness.

Mr. Young: Q. What I was asking particularly, Captain, is to what extent is the river used by towboats pulling rafts in this particular vicinity?

A. The east side is used ninety-nine per cent of the time, all of the time, as a matter of fact, unless there is something wrong or a break-up or something.

Q. How many towboats a day with rafts go by this place, would you know?

A. No, but I will guess. I will say three or four; maybe from three or four to a dozen.

Q. Three or four to a dozen a day—

(Testimony of Charles W. Ackerman.)

A. Yes.

Q. —go by. Now, could you give any estimate of the number of towboats with barges that go past this particular vicinity each day?

A. Well, that would be pretty hard to say.

Q. Could you give it by the week or the month?

A. Well, I am just going to say—I am going to give myself a wide space—from, we will say, three to ten barges a day. [204]

The Court: Mr. Young, I understood your witness yesterday to say that the log tows might be encountered on the west side of the river, which was an added reason for not getting over there with an up-bound tow of barges, but I understand from this witness, and I would assume, that the log rafts move up and down on the east side of the river.

Mr. Young: I think your Honor's remembrance of the testimony is in error, because I recall no testimony of any log rafts using the west side. In fact, have no information at all that they have ever used the west side, and I don't believe any witness so testified here.

Mr. Young: Q. So far as you know, Captain, do log rafts ever use the west side?

A. No, no. They don't.

Mr. Young: That is all.

(Witness excused.) [205]

CHARLES H. BOONE

produced as a witness in behalf of the Libelant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Where do you live?

A. 5616 North Haight.

Q. In Portland? A. In Portland.

Q. How long have you lived in Portland?

A. Well, I was born there, but I was away for
awhile.

Q. I will find out how old you are if we get the
correct answer there.

A. I have been here since 1893.

Q. Captain, you are a pilot, are you, of river
boats? A. Yes.

Q. And what license do you carry?

A. Well, Master's, pilot's license on the Colum-
bia River between Astoria——

Q. And covering what kind of vessels?

A. Steam vessels.

Q. Ocean-going as well as river?

A. No.

Q. River only? A. Yes.

Q. How long have you been engaged in that
work? [206]

A. I got the first license in 1907.

Q. And have you been continuously engaged in
your work on the river since 1907?

A. With the exception of a year and a half I
was in the hospital.

(Testimony of Charles H. Boone.)

Q. And that work has been confined to the operation of river boats? A. Yes, sir.

Q. In connection with your work, have you had occasion to go past Post Office Bar, which is located near the mouth of the Willamette River in the Willamette? A. Yes.

Q. How familiar are you with that particular vicinity?

A. Well, I have gone by there four or five thousand times, I guess.

Q. Four or five thousand times. At the present time by whom are you employed?

A. The Port of Portland.

Q. How long have you been with that organization? A. About four years.

Q. What is your work with the Port of Portland?

A. Running the Portland, Master of the steamer Portland.

Q. What is the steamer Portland?

A. Well, use her to move ships.

Q. Is she a stern-wheel boat? A. Yes.

Q. Captain, from your experience in the piloting of boats up and down the Willamette River past Post Office Bar, what can you say [207] as to whether or not it is safe or practicable for river boats to use the west side of the river in the vicinity of Post Office Bar?

A. Well, that would all depend on who you meet coming down. In my opinion, if they give you

(Testimony of Charles H. Boone.)

plenty of room you might make it, but if you didn't you are stuck?

Q. Then what would your answer be as to whether it was safe or practicable?

A. My idea was always to eliminate the chance of an accident as much as possible and go up on the east shore.

Q. Why would there be any more chance of an accident for the river boat to be on the west side?

A. Well, you are running along that dike. There is a dike, there, a short piling, and in the night-time it is pretty dark along in there until they cut those trees down, and it was pretty hard to determine just how far off shore you were. And the other side of the river, the worst you could do was to run into the sand bar if you got too close there, and another thing, you wasn't dependent upon the other man's idea of how to get by you. You was over there out of the way.

Q. What do you mean by saying you are "over there out of the way"?

A. Well, ordinarily they follow the left-hand side, favor the left-hand side of the river coming down, have been for years.

Q. Who favors the left-hand side?

A. The ships. [208]

Q. The ocean ships? A. Yes.

Q. And what about the river boats?

A. Well, they have come along, too, but then they don't make much difference.

(Testimony of Charles H. Boone.)

Q. I mean, which side of the river have the river boats customarily been proceeding up and down past Post Office Bar?

A. Well, I think the most of them go up the left-hand side of the river,——

Q. And——

A. ——with a tow. Of course, if they are running light it doesn't make much difference. Your boat is pretty active then.

Q. What would you say as to the extent there would be any greater hazard to a river boat in proceeding upstream on the west side than there would be proceeding upstream on the east side?

A. Well, you are just taking a chance that the other fellow don't give you enough room to get by, there, and, as I say, it is not a very nice shore to run along close to.

Q. What effect does the fact that you are rounding the outside of a curve have on the operation of your river boat?

A. Well, it probably sets her over a little; especially in the wintertime there is more or less drift in there. The current sets in on the piling along there a little bit.

Q. And what effect, if any, would the displacement swell of an ocean-going ship proceeding downstream have upon the operation [209] of your river boat on the west side?

A. Well, that depends on how close she run to you. If she got close enough to you to get suction

(Testimony of Charles H. Boone.)

from her wheel, it would pull your stern over towards her a little bit, maybe throw you off your course a little, but that would depend on how big she was or how fast she was going.

Q. The bigger she was and the faster——

A. The more suction.

Q. What about the displacement swell, itself?

A. Well, that doesn't make a great deal of difference, I don't think.

Q. To what extent has this custom to which you have referred of the river boats using the east side of the river, how long has that custom continued?

A. Well, when I started in in 1919 it was still going up that side. At that time you couldn't get over on the other side. The ocean-going vessels had to lay over to that dike pretty close, but they have dredged the channel since then, and as they dredge the channel that moves them away from the island, Sauvie's island.

Q. This custom to your knowledge has existed since 1899——

A. Yes.

Q. ——of the river boats using the east side of the river?

A. Yes.

Q. Is there any wind protection that the river boats have by being on the east side of the river that they would not have if they [210] were on the west?

A. Well, if there was a downstream wind it would probably be a little—a south wind, it probably wouldn't be quite as strong if you were over there in the bight and close to the island.

(Testimony of Charles H. Boone.)

Q. How about an east wind?

A. Well, an east wind blows in there, too, yes.

Q. What would be the effect of the east wind on your river boat if you were on the west side of the river as compared with being on the east side?

A. Well, you would have to keep heading into it a little, I suppose.

Q. Is there any protection on the east side that does not exist on the west, with regard to wind?

A. Well, not very much.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Captain Boone, before you went to work for the Port of Portland, whom were you employed by?

A. Well, I was employed by the Harkins Transportation Company and the Diamond O Navigation Company. You mean immediately before I went on there?

Q. Yes. Have you ever towed these paper barges for the paper company? A. No.

Q. So you have no actual experience handling them? [211]

A. No, not the paper barges, no.

Q. What kind of barges have you towed, sawdust barges?

A. Sand and gravel, mostly.

Q. For the Diamond O Navigation Company?

A. No, for the Star Sand Company and the Columbia Digger.

(Testimony of Charles H. Boone.)

Q. I was struck by your answer when you said that this channel in the old days back in 1900 was narrow and only on the side next to the dike, and the ships had to go that way. Is that correct?

A. Well, that is what—I noticed them come in there pretty close to the dike.

Q. In other words, when this custom of the tow-boats going to the left-hand side began, the channel conditions were that there was a narrow channel across Post Office Bar, ship channel, I mean, only about 250 feet wide. Isn't that true?

A. I imagine.

Q. Well, don't you know that?

A. Well, I was just a kid, then. I was only fifteen years old. I didn't know how wide the channel was.

Q. Well, when your knowledge of it first began, when was that?

A. Well, I was—1907 I got the first license.

Q. Well, what were the channel conditions there then?

A. Well, they—you had to stay in there. The ships stayed in there.

Q. The only ship channel there was at that time was in along this [212] dike. Isn't that true?

A. Yes.

Q. What? And that is when this custom began, didn't it?

A. (The witness shook his head "Yes.")

Q. Is that a fact? A. Yes.

(Testimony of Charles H. Boone.)

Q. And with the gradual widening of the channel the custom has kept on, hasn't it, for the tow-boats to keep to the east side? Is that your idea?

A. Yes, and the custom of the pilots is to come around that way, too. They haven't changed very much either.

Q. Notwithstanding the channel has now been widened till it is about 800 feet wide, isn't it, at this place?

A. That is what they say. I don't know.

Q. Don't you know it is about that?

A. No, I couldn't tell you how wide it is. I haven't had a chart for years.

Q. If you want to, you can step down and look at this one and scale it off. If we will assume that the deep ship channel now is 800 feet wide, 30 feet deep, 800 feet wide,—

Mr. Young: Just a moment. If the Court please, I don't know what the question is going to be, but I object to the assumption in any event upon the ground that it doesn't specify the depth.

The Court: Thirty feet, he said.

Mr. Young: Thirty-foot channel counsel is speaking about, [213] and not the 35-foot channel?

Mr. Wood: That is right.

Q. Assuming that the channel at Post Office Bar is 800 feet wide and 300 feet deep—

A. Three hundred?

Q. Eight hundred feet wide and 30 feet deep, is there any reason in your opinion other than the

(Testimony of Charles H. Boone.)

fact that this custom grew up in olden years for the prevalence of this custom?

A. Well, that thirty feet wouldn't do you much good, because this ship we moved this morning, she was drawing thirty feet. You would have to have a little more than that to float her.

Q. Do you think that a tug and tow such as shown in these photographs, here, cannot, with safety to herself, come up the right-hand side of the Post Office Bar channel with a 10- to 15-mile breeze from the east and a downstream current of one mile?

A. Well, I wouldn't know about that. I never handled that boat, and not knowing how she handled,—it depends on the ship coming down more than anything else.

Q. Well, if the ship coming down——

A. If it was guaranteed that the ship coming down was going to keep getting over to keep out of your way, you would be all right.

Q. You know what Article 25 of the Inland Rules is? A. Yes.

Q. What is it?

A. Keeping to the right on the narrow channels. [214]

Q. Yes. Every vessel navigating a narrow channel shall, when safe and practicable, keep to that side which lies on her own starboard hand. Is that right?

A. Well, that "safe and practicable"——

(Testimony of Charles H. Boone.)

Q. I quoted the rule right?

A. Yes, but that is where——

Mr. Young: The witness hasn't had a chance to complete his statement.

The Court: Oh, he is doing all right, Mr. Young.

A. That is where the hinges come, whether you think it is safe to keep over in there.

Mr. Wood: Q. Now, if the *Pennsylvanian*, an ocean-going steamer drawing about nineteen feet, were coming down that channel on a comparatively calm night, good visibility, do you think it would be safe and practicable for her to keep to her own right-hand side?

A. Well, yes. I imagine it would.

Q. And that being so——

A. But if the man on the boat didn't know he was meeting the *Pennsylvanian* drawing nineteen feet, maybe he thought he was meeting one drawing thirty feet.

Q. Well, we will come to that in a minute. I say the *Pennsylvanian* coming down under those circumstances was found to keep to her own right-hand side of the channel, was she not?

A. Well, he did.

Q. I say, didn't the rule require him to? [215]

A. Well, I don't know whether it would require him to run into the other boat or not.

The Court: By the way, I wish, there, something could be said more about this recall signal that was mentioned the other day. Some witness referred to a recall signal.

(Testimony of Charles H. Boone.)

Mr. Wood: I do not remember it, your Honor, and I do not know what he meant.

The Court: Either the pilot or the Master conditioned one of his answers on a recall signal being given.

Mr. Wood: I do not remember it.

The Court: Continue with this witness now, but I wish you would keep that in mind.

Mr. Young: We will clear that up when he comes in with this witness, your Honor.

The Court: If you are going to put this man on about the Siranger, shall we do that now?

Mr. Wood: I just want to ask him a question or two about it, yes.

Q. There is Article 25. I hand it to you so you can have it before you if you want to refer to it. Now, you have read it, Captain Boone?

(The witness laid the pamphlet on the table.)

Q. Now, if it was safe and practicable for the Pennsylvanian to keep to her own right-hand side, she was bound to do it, was she not? A. Yes.

Q. So that the up-coming towboat should rely on the down-coming [216] steamer doing her duty, should he not, and obeying the rule?

A. Well, I imagine by the time they got to the point where it was——

Q. No, just answer my question.

A. I suppose, yes, he would keep to the right, yes, if he thought he could get by.

Q. Then if the Pennsylvanian coming down did

(Testimony of Charles H. Boone.)

obey the rule and keep to that side of the channel which lay on her starboard hand, how much of the ship channel would she leave for the upcoming towboat? How much room between the down-coming Pennsylvanian and the dike would there be?

A. Well, I don't know. I wasn't there.

Q. Don't you know those channel footages?

A. Well, where she first saw this boat and what she did when she first saw it, if she started off to the right when she first saw it, or whether she kept on her course and didn't start to the right until she got pretty close to it.

Q. Well, do you want to step down here and look at this chart? Just familiarize yourself with that chart if you don't know it already. Do you recognize it?

A. Yes.

Q. Now, if the Pennsylvanian was coming down on this range, here, and left it about there, if she did her duty to keep to the right-hand side of the channel, how much would there be between her and the dike? You can measure it if you want to on the chart. Here, [217] I will give you a pair of dividers.

A. Well, she is coming down here.

Q. Suppose she obeys the rule and keeps to her own right-hand side of the channel.

A. She is drawing——

Q. Nineteen feet.

A. ——nineteen feet. It would be right along here, then.

(Testimony of Charles H. Boone.)

Q. How much room is she going to leave for the other ship?

A. Leave the whole river, there, according to that. Thirty-five feet, there. Is that the edge of the bank?

Q. The chart speaks for itself. The 30-foot depth curve is shown thus. See the little dots. Measure it yourself. Is that right?

A. Why did you stop there? Why didn't you keep on over here? There is water over there, isn't there?

Q. Do you want to look at this, Captain?

A. No.

Q. How much space would there have been left for the up-coming ship, assuming the *Pennsylvanian* did her duty and stayed on the right?

Mr. Young: If the Court please, your Honor will have in mind that these questions put by counsel, "assuming the *Pennsylvanian* did her duty." is one of the questions your Honor will be called upon to pass on.

Mr. Wood: Q. I will say "assuming she kept to the right-hand [218] side of the channel."

A. Assuming where she started to get to the right?

The Court: Come back to the chair, please.

Mr. Wood: Q. Captain, that seems a simple question to answer. I wish you would give us the benefit of your opinion on it.

A. Well, if you could tell me where she was when

(Testimony of Charles H. Boone.)

she took to the right. That map just shows the courses.

Q. Well, Captain, I have shown you here on the chart that here the Barry K when she sighted the Pennsylvanian was in the general vicinity of Post Office Bar 3, and the Pennsylvanian was up about abreast of Multnomah Channel on her right-hand side.

Mr. Young: If the Court please, I think the witness should be further informed that the Pennsylvanian was coming down the Post Office Range, however, which necessarily——

A. That is what I am trying to get, is when she left that range.

Mr. Wood: Come on down here. I will show you.

Mr. Young: If counsel can show the witness, your Honor, where the Pennsylvanian was when she left the range, there is no testimony in the case at this stage to indicate that. We don't know exactly where she was in the present state of the record.

Mr. Wood: Q. Now, Captain Boone, the Barry K was here, according to Captain Reed, when he first sighted the Pennsylvanian. The Pennsylvanian was here, as near as Captain Reed could tell, when he first sighted her, see. Now, assuming that the Pennsylvanian, commencing from this point, or a hundred feet, or [219] a few hundred feet from there, began to leave the range and come down

(Testimony of Charles H. Boone.)

here to the right so that the vessels would meet anywhere in this vicinity—well, there is the collision—supposing they were going to meet down in that part of the channel, see, but the Pennsylvanian, I want you to assume, kept to her right-hand side——

A. She left the range here?

Q. And that is where the collision took place.

A. In a direct line she went to there?

Mr. Young: Pardon me. If the Court please, there is no evidence to indicate that the Pennsylvanian left the range a hundred feet——

The Court: It will have to be. Mr. Wood may be intending to put it in, as far as I know.

Mr. Young: I want to clarify that point. There is nothing in the record at this time, at least.

Mr. Wood: Q. Captain Boone, here is where she was when Reed first saw her, so he says. Here is where she was when the collision took place.

A. How far is that?

Q. That is up to you.

A. Where is that other light over here?

Q. Captain Boone, I will ask you this. This seems simple enough. Look here, now. Is not that channel all along there, about the vital part we are talking about, the whole distance of it there [220] is practically the same width, is it not?

A. Well, you have only got part of the channel. There is some more over here.

Q. I know it. I am talking about the dredged 30-foot channel. It is the same width all along, is it not, about 800 feet?

(Testimony of Charles H. Boone.)

A. That is what you measured it.

Q. If it is all the same width, it does not make any difference where they meet, as long as I assume the Pennsylvanian was obeying the rule and keeping to the right. If she obeyed the rule and kept to the right, how much water would there have been for the up-coming ship to pass in?

Q. According to that, she would have the whole river, there.

Q. Isn't that enough?

A. I don't know. You would have to determine whether she was really there or whether she cut across there. That is the question.

Q. If the Pennsylvanian did her duty and kept to the right, the up-coming ship would have five or six hundred feet of water anyway to pass in, wouldn't she?

A. Well, of course, as I say, it depends on when she started over to the right. If she followed that shore down—yes, nineteen feet—she would be pretty close to the bank.

Q. I do not see why you are so unwilling to give me a direct answer on this.

A. I don't know where she was, if she arrived at that point.

Q. I have shown you the channel is the same width all the way where [221] they met.

A. Maybe she is farther over to the left and went over there later on.

Q. How much room, then,—I will put it to you

(Testimony of Charles H. Boone.)

this way—should the Pennsylvanian have left on her port side for the other boat to pass safely with her tow?

A. Well, that would be up to him. I don't know. I couldn't say that, because I don't know how he handles his ship.

Q. Well, Captain Boone, on your direct testimony when you were testifying for your counsel, here, you testified that it would be all right for the up-coming boat to take the right-hand side if the other fellow left him enough room.

A. Yes; sure.

Q. All right. How much room do you have to leave him?

A. Well, leave him enough to get by. It depends on the boat.

Mr. Wood: If that kind of answer satisfies your Honor, why it satisfies me.

The Court: Why drag me into this?

Mr. Wood: Q. You said the displacement wave would not have much effect, did you not?

A. "The displacement swell," I said. The swell from the bow, as I understand it.

Q. The displacement swell of the down-coming Pennsylvanian would not have any appreciable effect, you said, on the towing?

A. Not necessarily, I think. [222]

Q. I think so, too. Then you said that the suction from the steamer might have some effect?

A. Yes.

(Testimony of Charles H. Boone.)

Q. How close would they have to be to produce that effect?

A. Well, it depends on the speed of the ship and the draft. Some ships suck worse than others, too. I couldn't give you a——

Q. You can't give any answer to that?

A. I have had them pull me, yes. Got too close to them.

Q. Can you give us any idea?

A. Well, I was probably fifty or a hundred feet.

Q. About this night, with the Pennsylvanian coming down drawing nineteen feet and the upcoming ship going six miles an hour, can you give us any idea how much effect the suction would be?

A. No, I couldn't, no.

Q. No. But if there was suction, what would its effect be on the Barry K and her tow? What would it do to them?

A. Well, it would interrupt her course.

Q. Which way?

A. Well, it would ordinarily pull the stern of the boat to the ship.

Q. That is what I thought. Then if the Barry K were coming up on the right-hand side, here, crab-wise, holding her nose out into the breeze a bit, and the Pennsylvanian produced any effect on her by suction, it would be to pull the Barry K's stern this way, would it not? [223]

A. Yes. Probably pull the barges first, though.

(Testimony of Charles H. Boone.)

Q. That is what I want to find out. First you said it was going to pull the stern. Now you say pull the barge.

A. It doesn't necessarily have to be the boat. That is where you generally feel it the quickest, on the stern.

Q. In other words, it would have a tendency to straighten her up in the channel, would it not?

A. Yes.

Q. That would not do her any harm, would it?

A. I guess not.

Mr. Wood: That is all.

Mr. Young. That is all.

(Witness excused.)

The Court: Now, Captain Stayton.

N. W. STAYTON,

a witness in behalf of the Libelant, was thereupon recalled for further cross examination, and, having been previously sworn, further testified as follows:

The Court: Mr. Wood reserved the right to ask you about your testimony in the Siranger case, Captain.

Mr. Wood: That is right. [224]

Further Cross Examination

By Mr. Wood:

Q. I have sent into the clerk's office and got the testimony in the Siranger case, and I want to

(Testimony of N. W. Stayton.)

read you a passage where the Court was questioning you, and ask you if you remember giving this testimony, if it is correct:

"The Court: Were you figuring on going right on past there without giving a passing signal?

"A. Yes, sir. I meet a good many tugs in there on both sides of the channel and well off the ranges, and we blow no passing signals.

"The Court: Your idea is that the rules aren't binding on you, or are they?

"A. Not under the rules of these motorboats. I don't think they are included in it. They are not included as steam vessels, these little uninspected craft.

"The Court: You think it is only steam vessels that you have to blow for?

"A. Steam vessels and inspected motor vessels, larger vessels.

"The Court: The rules don't say anything about that, do they?

"A. Well, I will tell you, Judge, the rule on motorboats and such like as that is kind of funny. It is a kind of a hard rule to understand entirely.

"The Court: Do you mean to say that you don't think [225] they are binding on you? Is that what you are saying?

"A. No, I wouldn't say that, Judge.

"The Court: Well, you don't think that this rule requires you when you overtake a vessel to blow for anything on the river?

"(No answer.)"

(Testimony of N. W. Stayton.)

Now, do you remember giving that testimony?

A. Was that before the Court, or was that before the inspectors?

Q. That was before the Court. The Court was asking you the questions. If you wish to refer to this later it is page 344.

Mr. Young: I don't have it.

A. I suppose if it is in the record why I made it.

Mr. Wood: Q. Well, then, do you now, in the light of that testimony, admit that you don't always consider these pilot rules binding on you?

A. If that is brought into the record, hasn't the right of—the Inspectors' decision on this Siranger case with that collision got a right to be brought into the Court?

Q. I don't know about that. I am asking you whether you gave that testimony and if it is correct.

The Court: Well, that is not the question. He says if it is related there he must have given it. Now, the question is what his present position is as to the rules, Mr. Wood.

Mr. Wood: Q. Do you think, as a pilot, that the rules as to blowing signals are binding on you pilots or not? [226]

A. They are at the present time. I told you since the Siranger case came up that this law has been changed and the motor boats are under a new regulation to what they were at that time.

The Court: Q. Well, there are no motor boats in this case.

(Testimony of N. W. Stayton.)

A. Motor boats are considered as a steam vessel at the present time.

Q. Well, did you understand and do you understand now that there was a time on the river when you did not have to blow any signals at all to a motor boat?

Mr. Young: If the Court please, it seems to me there ought to be something in this type of cross examination, because there is no motor boat involved in this case.

Mr. Wood: I am going into the competency of this pilot and also to show that they do not regard these rules as binding on them.

The Court: Q. The question he is asking you is whether you, as a former tugboat man—I understand you graduated into a deep sea pilot, Columbia River pilot,—as a former tugboat man, do you consider the Inspectors' rules were binding on towboats, particularly as to blowing signals? That is the question. Let us pin it down to that. Did you ever take that position?

A. They are at the present time, Judge.

Q. Were they at the time of this accident, in your opinion?

Mr. Young: February 1, 1941.

A. This accident wasn't in February, '41, Judge.

The Court: Q. What? [227]

A. This accident wasn't—

Mr. Young: February 1, 1941, is the date of the Barry K accident.

(Testimony of N. W. Stayton.)

The Court: Q. In the present case the accident occurred in February, 1941?

A. Yes.

Q. Do you think the rules were binding then on towboat men?

A. Certainly. This was a steam vessel that had this tow.

The Court: Anything further?

Mr. Wood: Q. I should like to ask him whether, at the time of the Siranger accident, he considered the rules requiring passing signals were not binding on him.

The Court: Well, Mr. Wood, I think that is covered.

Mr. Wood: Very well. I withdraw it.

The Court: Anything further?

Mr. Young: No questions.

The Court: Step down.

(Witness excused.)

Mr. Young: Your Honor made some inquiry as to the use by Captain Reed of the term "recall signal." In checking with Captain Reed, he does not recall using that term.

The Court: No, I will just tell you the impression I got. The reporter says it was right. The Barry K blew the first signal, the two blasts. Then the Pennsylvanian answered with one. [228] Then

there is the same sequence of signals by the Barry K without answer, four, two, and four, and some place in there when he was being examined about his impressions at the time as to what he might expect of the Pennsylvanian, he said it might have been different if you got a recall signal, something like that.

Mr. Young: Why not call Captain Reed to the stand?

The Court: Suit yourself.

Mr. Young: As long as your Honor has raised the point, I should like to have it clarified.

Captain Reed, will you take the stand, please?

I wonder if the court reporter could turn to that testimony.

WM. A. REED,

produced as a witness in behalf of the Libelant, was recalled to the stand and testified further as follows:

Further Direct Examination

By Mr. Young:

Q. Captain Reed,—

The Court: Q. First, what is a recall signal?

A. There isn't such a thing.

The Court: That is easy. There is no such a thing.

Mr. Young: Q. Did you in your testimony yesterday make any mention of a recall signal?

A. I don't think I did.

Q. If you used the word "recall," did you intend to use that word? [229] A. No.

(Testimony of Wm. A. Reed.)

The Court: Q. Do you remember this instance that I am talking about?

A. No. I tried to hear all of it. I couldn't, your Honor.

Q. The reporter and I both have the same recollection. In giving your testimony you said at a certain point that if you got a recall signal—or that your conduct might have been different. Do you remember anything like that at all?

A. No, I really don't remember it.

Q. Anything at all like that? A. No.

The Court: We will attribute it to the hot weather.

Mr. Young: I might make the suggestion that the reporter might check that, and if he will supply me a short transcript of it we will check it.

Mr. Wood: I want to ask him a question as long as he is on the stand.

Further Cross Examination

By Mr. Wood:

Q. Captain Reed, I am showing you Libellant's Exhibit 4, a photograph of the Barry K. The pilot house on that ship was changed or altered, at one time, was it not? A. It was.

Q. At what date was that done?

A. I don't recall. [230]

Q. Before or after this accident?

A. Before.

Q. Do you know how long before?

A. No, I really couldn't state.

(Testimony of Wm. A. Reed.)

Q. Can you tell what the change was?

A. Yes, sir. The pilot house was raised about seven feet higher than originally.

Q. Could you point on the photograph and show the Court the alteration that was made?

A. This cabin—or there was two cabins put in here (indicating), one on this end, and one on the back end was put in between the pilot house and the cabin.

Q. Raising the pilot house?

A. Raised it exactly seven feet to measurement.

Q. Did it raise anything else?

A. Yes, it raised the side lights and the mast lights.

Q. Did it raise any of the rest of the housing?

A. No.

Q. Just the pilot house?

A. Just the pilot house.

Q. Raised that seven feet?

A. Raised that seven feet. But there were two rooms.

Q. And were those two rooms built on there additional?

A. Yes, additional from the original.

Q. So those two rooms—well, what are the dimensions of those two rooms? [231]

A. Those rooms were 22 feet long and 7 feet high.

Q. So they gave an exposure to wind pressure of 22 feet by 7 feet?

A. Yes, sir.

(Testimony of Wm. A. Reed.)

Q. And then on top of that you put a pilot house seven feet higher than it had been before?

A. No, the original pilot house just raised.

Q. I know, but the height of it was seven feet more than it had been before? A. Yes.

Mr. Wood: Does your Honor understand that?

A. Seven and a half feet.

Mr. Young: Q. And you are clear in your mind that that raising occurred before the accident—— A. Yes, sir.

Q. ——of February 1? A. Yes, sir.

Mr. Wood: Q. And all of that would increase the surface exposed to an easterly breeze, would it not? A. Yes, sir.

Q. Did you have anything to do with that raising of the pilot house? A. No, sir.

Q. Who decided on that?

A. Mr. Confer and Mr. Gault.

The Court: We are going to quit at twelve, Mr. Young. You have 21 minutes.

(Witness excused.) [232]

Mr. Young: I cannot guarantee to finish with the cross examination of this witness. We can put him up and stop at twelve.

HENDERSON B. DAVIS,

produced as a witness in behalf of the Libelant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Mr. Davis, do you live in Portland?

A. 7427 Southeast Ninth.

Q. And how long have you lived here?

A. Well, I haven't lived here all of the time since 1903. I have been in and out of Portland since 1903.

Q. What is your occupation?

A. At the present time?

Q. Yes.

A. I am alternate Master and pilot of the tug Shaver.

Q. Employed by whom?

A. Shaver Transportation Company.

Q. What was your work prior to that time, prior to the time you worked for Shaver Transportation?

A. Oh, pilot and Master of tugboats.

Q. And what license do you hold?

A. Master of inland vessels of any gross tons, and pilot, first-class pilot, from Astoria, Warrendale, and Oregon City. [233]

Q. And how long have you held those licenses?

A. 1926.

Q. How long altogether have you had experience in the operation of boats on the river in any capacity?

(Testimony of Henderson B. Davis.)

A. You mean as a deck hand, too?

Q. In any capacity. A. Since 1917.

Q. And then since 1917, then, you have been on the river on river boats, have you, working on river boats? A. Yes, sir.

Q. Do you have a license to operate ocean-going steamers? A. No, sir.

Q. Your experience is confined to river boats?

A. Yes, sir.

Q. To what extent have you had occasion to go past Post Office Bar which is down the Willamette River near its mouth?

A. Well, that is quite frequent, but it is hard to tell how many times that you would a week or anything like that, because we go into the lower river and get a tow and come back. I would say twice a week anyway.

Q. So you are familiar with Post Office Bar?

A. Yes, sir.

Q. Based upon your experience in the operation of river boats and towboats, will you state to the Court whether in your opinion it is safe or practicable for river boats to use the west side of [234] the river when passing Post Office Bar?

A. Well, we use the east side of the bank all the way through.

Q. Just answer the question. In your opinion is it safe or practicable for river boats to use the west side of the river at that point?

A. No, I would say it isn't safe to use the west side.

(Testimony of Henderson B. Davis.)

Q. Now, will you explain your answer?

A. Well, that is quite a question to explain, to my idea.

Q. Well, you have the opportunity, so explain it now, please.

A. You get down in that bend in there with a tow of barges or rafts, why you are in too close a quarters to pass a ship.

The Court: Now, right there, he has got barges and rafts over on that side of the river again.

Mr. Young: Q. Now, have you ever operated or piloted a river boat pulling a raft or pushing barges, and used the west side of that river?

A. No; no, I never did.

Q. You never did? A. No, sir.

Q. Have you ever seen any other pilot operate river boats on the west side of the river around Post Office Bar?

A. Well, as far as I could recall, I saw a boat—I couldn't say what year it was—an Astoria boat come up around that side.

Q. Is that the only instance you know of?

A. That is the only one that I have seen, myself. I couldn't say [235] what has happened while I was away from there.

The Court: Q. Then what do you mean by meeting rafts or barges over there? What did you mean by that a minute ago?

A. I never said "meeting rafts or barges." I said I wouldn't go over there with rafts or barges.

(Testimony of Henderson B. Davis.)

Q. I thought you said a minute ago, and I think the witness said the other day, that if you got into that bend and you came on some rafts or barges you would be in a fix.

A. No, I never said that.

The Court: Which, of course, is contradictory to your theory of the case, that rafts and barges are never over on that side of the river.

Mr. Young: I am still convinced, your Honor, that a check of the transcript there will show that no witness has testified to rafts or barges.

The Court: I misunderstood him. He says, if you get in there with rafts or barges.

Mr. Young: That is to say, if you did that you would be too close.

(The last question and answer were read by the reporter.)

Mr. Young: Q. To your knowledge, will you state whether or not it has been the uniform practice of river boat men to use the east side of the river in passing Post Office Bar?

A. Absolutely, yes.

Q. And will you inform the Court as to what distance along the [236] river that practice has obtained in?

A. You mean from Astoria, up in?

Q. Well, how far up or below Post Office Bar?

A. From the mouth of the Willamette.

Q. And how far upstream?

A. I will say around the highway bridge or street bridge at St. Johns.

(Testimony of Henderson B. Davis.)

The Court: Q. Do you claim that river boats without tows do that, too?

A. Well, the river boat without a tow, why they are more active.

Q. I know what they are.

A. They go where they want to go.

Q. I know what they are. What I want to know is, do you claim they do that, too?

A. I do. I hold the east side all the way along there.

Mr. Young: Q. Have you, yourself, ever seen anyone else piloting a river boat without a tow or without—it is either a tow or barge—in using the west side?

A. A boat running without a tow?

Q. Running light, yes. A. Yes.

Q. You have seen that? A. Yes, sir.

Q. However, then, your answer, as I understand, is confined to the river boats which are either pulling tows or pushing barges. Is that correct? [237] A. Well, a barge is a tow.

Q. Well, either way. In some way handling barges or rafts, let us say.

A. Well, handling barges or rafts we stay to the east bank.

Q. Stay to the east bank, there. Now, a few moments ago you stated in your opinion it was neither safe nor practicable for river boats to use that west side of the river. You were about to state why. Now, will you develop that, please?

(Testimony of Henderson B. Davis.)

A. Well, when you see a ship coming down there, you don't know whether it is going to draw nineteen feet of water or thirty-five feet of water. And if you were in there close enough to the bank and the swells from the ship or the kick-up from the stern would come in against you with the tow, why it would set you over into the dike, if you was a couple of hundred feet off the dike, and if the wind was blowing, there, and you had to slow down for your lines, to keep the ship swells from parting your lines, and the wind was blowing on that west bank, which it does quite often in the wintertime, why you would blow on that bank, on that west bank.

The Court: How long is that dike, Mr. Young?

Mr. Young: Were you asking me, your Honor?

The Court: Yes.

Mr. Young: It is a little over four thousand feet long.

Q. Do you agree with that, Mr. Davis?

A. Well, I couldn't say exactly how long the dike is, because part [238] of the lower end of it is tore out, down at the lower end.

Mr. Young: I think it runs a little over four thousand feet, your Honor.

Q. Mr. Davis, I am handing you Libellant's Exhibit No. 5, which is a photograph of the Barry K with the barges which she was pushing at the time of the accident.

The Court: Mr. Young, these people all say they

(Testimony of Henderson B. Davis.)

stay on the east side there for a distance of two to two and a half miles?

Mr. Young: Yes.

The Court: That is twelve to fifteen thousand feet.

Mr. Young: That is right.

The Court: And they emphasize, as the Number 1 reason for doing so, the danger from the dike which is only over four thousand feet of the distance.

Mr. Young: That is right.

The Court: Do you claim that the existence of the dike there for a third or a fourth of the distance is controlling as to the entire area through there?

Mr. Young: That is one factor, your Honor. Our position is this: that, as you observe from an examination of the chart, there is a long, sweeping bend of the river which runs there for possibly a mile and a half to two miles, throughout its entire length. The dike, to which we have been referring, happens to be located at the point which is in close proximity to the point of the accident which was involved in this case, and at that [239] particular point creates an additional hazard, which, perhaps, may not exist at other points along the river, there. However, ships which are traveling along the stream do not travel with the speed of either airplanes or automobiles. They are traveling comparatively slowly, and their maneuverability is

(Testimony of Henderson B. Davis.)

therefore much more limited. For that reason, if a boat, for example, is coming upstream, a river boat, and it is to avoid the hazard which is on the west side of the river at this point, it naturally will have to stay over on the east side for a greater distance than merely the length of some four thousand feet, which is on the west side where the dike is, in order to miss the dike altogether. That is simply one factor which enters into it. In so far as this custom is concerned, its relevancy to this lawsuit is naturally confined to the place where the accident occurred. It happens that the testimony of the witnesses covers a little greater area than the particular point of accident.

The Court: Well, what factor, really, other than the dike, is in accordance with the bearing——

Mr. Young: The fact—the witnesses have already referred to them, your Honor—the fact that the ship is coming around a long, sweeping bend, and if the river boat is on the outside of that bend—that is, over near the west side—there is the tendency towards side-slipping.

The Court: It all comes back to the dike. They would be thrown against the dike. [240]

Mr. Young: If the dike wasn't there they would be thrown against the shore. The dike makes an increased hazard, because it is more dangerous to run into the dike, which has the spikes in it which one of the witnesses has mentioned——

Mr. Wood: There is no testimony that that con-

(Testimony of Henderson B. Davis.)

dition prevailed at that time. In fact, the testimony was that the barges went over there and tied up along the dike, which would imply the piles were out of the water.

Mr. Young: The piles, in fact, vary in height. Some of them are out of the water and some of them are not. The only point I am making at this time is—and this is a matter that is perfectly obvious to anyone—that if a river boat grounded on a soft bank the amount of damage to a riverboat would be less than the amount of damage if the river boat runs against a piling, whether the piling is out of the water or under the water or both places. That is the point I make, there.

Now, answering your Honor's questions further, there are a number of factors that enter into this. Take, for example, the Barry K coming down the Columbia River and making the turn at the mouth of the Willamette. If that boat has to avoid the hazard, let us say, of this dike, which is on the west side of the stream, there would be no sense in the Barry K first crossing the mouth of the Willamette and going over to the right-hand side until it gets up to the point just opposite the dock and then at that point crossing over to the left-hand side, staying there [241] until it gets back to that particular hazard and then coming back to the right-hand side again. In other words, you would have three crossings of the river involved, whereas, in following the course that the Barry K was following at this time, there wasn't any crossing of

(Testimony of Henderson B. Davis.)

the river involved, and to that extent a hazard of collision of boats going in each direction, whether ocean-going boats or river boats, would be considerably reduced. That is one of the factors which enters into the picture in explaining why it is safer and more practicable for the river boats to stay over on the east side of the river all of the way up from the mouth of the Willamette to the place where this accident occurred and to some little distance beyond.

The Court: Practically the city limits of Portland.

Mr. Young: Yes, that is true, because the bend runs up here practically to the city limits of Portland. Here is the Port of Portland terminal right at this point, and you are just pulling out of the bend when you get up to that point (indicating). These factors of side-slipping, the factors of the effect of displacement swell from a downstream ocean-going ship throwing the waves over against a light-draft river boat proceeding upstream, tend, as the witnesses have indicated, to throw the river boat over to the river boat's right or starboard side and would increase the danger of running into either a bank or a dike, if it happens to be in the position of the location of the dike. Those hazards are all eliminated when the river boats use the east side of the stream. [242]

The Court: The dike is the big feature, then.

Mr. Young: The dike is a big feature.

(Testimony of Henderson B. Davis.)

The Court: The dike has been featured.

Mr. Young: There is no question about that. As a matter of fact, the accident happened just opposite that dike, just across the river from the Silo Dolphin, as indicated on this map.

The Court: You don't have any further questions in a short time?

Mr. Young: Well, probably not, your Honor.

The Court: Eight o'clock in the morning, gentlemen.

(Thereupon, at 11:55 o'clock A. M., Court was adjourned until tomorrow, Thursday, July 17, 1941, 8 o'clock A. M.) [243]

Thursday, July 17, 1941,
at 8 o'clock A. M.,

pursuant to adjournment, the following further proceedings were had:

Mr. Reed: If the Court please, yesterday morning your Honor inquired of Captain Reed whether he had used the term "recall signal" in his testimony, and Captain Reed, upon the stand, did not remember having used that language. Since yesterday, the reporter has run off a part of Captain Reed's testimony, and I should like at this time to put Captain Reed upon the stand in this regard toward the end of clarifying the use of that word.

The Court: Have you seen a copy of it?

Mr. Wood: No, I have not.

The Court: Give that to Mr. Wood.

WM. A. REED,

produced as a witness in behalf of the Libelant, was recalled to the stand and testified further as follows:

Further Direct Examination

By Mr. Young:

Q. Captain Reed, the reporter's transcript of the part of your testimony when you were first on the stand and under your cross examination by Mr. Wood contains the following question and your answer as follows: "Question: You think that when you request a starboard to starboard passage with two blasts, the other [244] ship must accede to it? Answer: Yes, sir. If she doesn't she can blow me a recall or a danger whistle." Do you recall having given that answer?

A. I don't recall it, but the court records shows it. I must have done it.

Q. Have you any explanation for the use of that word "recall"?

A. Well, the only explanation I could make on that "recall," I think there is such a thing when you go up to a bridge and blow for it and then you decide not to go through, you recall the whistles that you put in. My interpretation of this was, if he didn't want to go to starboard he could have called my whistles with a danger whistle. That is about the only interpretation I could have. He should have given me a danger whistle if he didn't want to pass starboard to starboard.

Q. You mean a danger whistle instead of a port passing whistle? A. Yes.

(Testimony of Wm. A. Reed.)

Mr. Wood: While Captain Reed is on the stand I might want to ask him one question.

Further Cross Examination

By Mr. Wood:

Q. Captain Reed, at my request the other day you marked on the chart the place where the barges ended up at the end of their drift after they were torn loose. A. Yes, sir.

Q. We marked it here on the chart together, but I didn't ask you, [245] and I should like now to ask you, to show us where it was that the Barry K went and tied up after the collision. I think you mentioned some Silo Dolphin.

A. Yes, sir. Silo Dolphin, right about here.

Q. Is it so marked? A. Yes.

Q. It is marked on the chart "Silo Dolphin"?

A. Yes. That is right close to the dike. We had a line out on the port side of the bow to the dolphin, and we rested right alongside of this dock. I eased down easy on account of the wind.

Q. That is, the dolphin is on the channel side of the dock? A. Yes, sir.

Q. And you tied up at the dolphin and lay alongside of the dike? A. Yes, sir.

Q. Just for the sake of the record, here, that Silo Dolphin is right close to the rear range light of the Post Office Range?

A. About the middle between the front and rear range, I would say.

(Testimony of Wm. A. Reed.)

Q. Is that a little circle there to indicate the dolphin? A. Yes, sir.

Mr. Wood: Thank you.

The Court: You don't need to come back up here.

Mr. Young: I should like to ask one question in regard to this, however.

Redirect Examination

By Mr. Young:

Q. What is the nature of that dolphin? [246]

A. I think it was a three-pile or four-pile dolphin. It was drove there originally, I think, to keep the stern of the boats that picked up milk off of the dike while they was picking up the milk off of the landing. There was a farmers' landing, there. I think that is originally—I am not sure—I am not acquainted with the history of it. It is right close to that landing.

(Witness excused.)

Mr. Young: Mr. Davis, will you take the stand?

The Court: While he is walking to the stand, Mr. Young, in your opening statement you said that the crossing of the Barry K's signal by the Pennsylvanian was, in itself, negligence.

Mr. Young: That is correct, your Honor.

The Court: What did you mean by that?

Mr. Young: The rules provide that signals shall not be crossed. That means that if the Barry K blew a whistle or a signal for, let us say, a star-

board to starboard passage, and the other ship did not wish to accede to a starboard to starboard passage, it could not answer the two blasts of the Barry K by one blast indicating a port to port passage, but rather would be required to answer with a danger signal, which would indicate then to the Barry K that the other ship did not wish to do what the Barry K asked it to do. [247]

The Court: You evidently do not want to say anything. You do not care to say anything at this time?

Mr. Wood: I was not going to, but inasmuch as your Honor has asked me, I will say there is no occasion here for even a discussion of cross signals, because the Pennsylvanian received from the Barry K a one blast. They say they blew two. Three men on the bridge of the Pennsylvanian, all the navigating officers, heard it as one blast. They answered with one. That does not give rise to a cross signal question at all.

The Court: While you are up, Mr. Wood, do the Inspectors have authority to impose disciplinary penalties other than following accidents? To be specific, I do not know what the fact is, but assuming that the Inspectors held the general view that this channel down here had been deepened and widened by later improvements so as to make no longer necessary its general use on the easterly side by tugboats as formerly,—assuming that river boatmen persisted in following the old practice, do the Inspectors have authority to impose disciplinary

penalties for that use contrary to their opinions?

Mr. Wood: Where there has been no accident?

The Court: Yes.

Mr. Wood: I think they have. I think they can impose penalties on any officer whom they regard as guilty of negligence.

The Court: What is the last word?

Mr. Wood: I think they can impose penalties on any officer whom [248] they have licensed and whom they find has been guilty of negligence, whether an accident has resulted or not. That is my view.

The Court: Guilty of improper navigation?

Mr. Wood: Yes.

Mr. Young: May I make a comment, your Honor, with reference to this matter of the cross signaling? I take it from counsel's answer to your Honor's question that he would concede that if, in fact, there were no controversy about the nature of the whistle blown by the Barry K as being a starboard to starboard passing whistle, that then the pilot of the Pennsylvanian would have no right to answer that whistle with one blast, which would call for a port to port passage.

Mr. Wood: No, Mr. Young. I make no such concession. I don't think the case has anything in it giving rise to even a discussion of cross signals.

The Court: Continue the examination.

HENDERSON B. DAVIS,

a witness produced in behalf of the Libelant, having been previously sworn, resumed the stand and testified further as follows:

Mr. Young: May I have from the clerk the photographic exhibits, please?

Direct Examination

(Cont'd.)

By Mr. Young:

Q. Captain Henderson, I am handing you——

[249]

Mr. Wood: Captain Davis, is it not?

Mr. Young: I beg your pardon. His first name is Henderson. Captain Henderson Davis.

Q. Will you examine Libelant's Exhibit 5, which is a photograph of the Barry K with barges which she was pushing at the time of this accident, showing the manner in which they were lashed to the Barry K. The evidence in this case indicates that the total length of the Barry K and the barges was about 305 feet, that the deck houses on the barges stood about twenty feet above the water, that the deck house on the Barry K extended the greater length of the Barry K, and that up to the top of the pilot house was a distance of about 34 feet. From your examination of that photograph, I will ask you to state what, in your opinion, would be the effect of an easterly breeze of about ten to fifteen miles per hour upon the port side of the Barry K and its barges, assuming it was proceed-

(Testimony of Henderson B. Davis.)

ing upstream, and let us assume that it were over on the west side of the river instead of the east side.

A. Well, it would have a tendency to carry you to the west.

Q. And that is due to what?

A. That is due to the wind on the sides of the barges and the boat.

Q. And in the vicinity of Post Office Bar, if the barges and the Barry K would tend to be carried over toward the west, what hazard might they encounter on the west?

A. Well, you wouldn't want to hold along the west bank on account of if you had to stop there that you would go right in on those [250] piling on the west side.

Q. Those short piling to which you refer, that is the dike that has been mentioned?

A. It is the whole dike that is built along there. I don't know when it was built. It has been there ever since I have been on the river, and if you get over in there with any speed at all you would undoubtedly puncture your barges.

Q. Is there any increased hazard to the river boat if it were using the west side of the river by night as distinguished from by day?

A. Well, if you could use your searchlight along there coming up at night, which would be against the law, if there was a ship coming down, or a river boat, why you could possibly stay two hun-

(Testimony of Henderson B. Davis.)

dred feet off of those piling, but you—it is so dark down in that hole that you couldn't possibly tell how close you were to the piling.

The Court: What did he say? He was against the law?

Mr. Young: To use a searchlight.

A. You can't throw your searchlight into the pilot house of any other boat, where it reflects into the pilot house of any other boat.

Q. Then in your judgment do I understand that there is a greater hazard in using the west side of the river at night than there would be in the daytime?

A. Oh, yes, because you could see the piling in daytime. You [251] could see what wasn't underneath the water.

Q. Now, to what extent is this hazard to which you refer related to the likelihood of passing ocean-going ships going downstream at that point?

A. Well, if you would meet a boat or an ocean vessel coming downstream and you was on the west bank and then there would be another ocean vessel coming upstream, you would be right where the upcoming vessel wanted to be.

Q. Now, suppose that you were traveling upstream along the east shore. Would the hazards to which you have referred still exist?

A. No, because you can go pretty near up to the bank with a river boat.

(Testimony of Henderson B. Davis.)

Q. And would that be true of a river boat which is pushing two barges? A. Absolutely.

Q. What has been your observation as to the range in size of ocean-going ships that one might expect at any time to meet in the Willamette River at this point?

A. Well, you could figure that you would meet boats drawing thirty-two feet of water and in the neighborhood of five hundred feet long, and you can't tell when you see one of those ships coming at night how large they are or how much water they are drawing. It is my opinion that the tug-boats should stay out of the way of the deep-draft boats, because if you are only drawing, say, six feet of water with a river boat, I can't see why the [252] river boat should crowd the deep sea vessel.

Q. With reference to this matter of wind resistance which you mentioned, would there be any protection to the river boat if it were over toward the east shore, which protection might not exist on the west shore?

A. Well, you would be closer to the trees on the east side, and the wind wouldn't be as strong on the east side as it would on the west side.

Q. Are you familiar with the term known as "side-slipping"?

A. Well, side-slipping, you can drive a stern-wheel boat into a bend and they will slip sideways with a tow of barges.

(Testimony of Henderson B. Davis.)

Q. That means a sideways movement of the boat. Is that correct? A. Yes.

Q. Now, is the possibility of side-slipping stronger in the case of a river boat than of an ocean-going steamer?

A. I never piloted an ocean vessel in my life.

Q. Now, in the case of a river boat which is on the outside of a curve, rounding the curve on the outside, what is its tendency with regard to this matter of side-slipping if it is, let us say, going upstream on the outside of the curve?

A. Well, a stern-wheel boat would have more tendency to slip into the bend than a propeller boat would.

Q. Now, if a steamer is coming down the stream, an ocean-going steamer, to what extent would the displacement swell of that ocean-going steamer affect the operation of the river boat going upstream? [253]

A. I know what you mean. Well, if a vessel was coming down under control, there wouldn't be any, but if there was one coming down at high speed through there, like, I will say, that seventy-five per cent of the vessels do, in that 35-foot water, it would suck off the bank, and when the vessel passed why it would then go back towards the bank, the current would. Then on the swing the wheel current or kick-up from that would have a tendency to kick your barges over into that dike.

Q. Now, to what extent is the effect that you

(Testimony of Henderson B. Davis.)

have just described dependent upon the speed of the ocean-going ship?

A. Well, it has always been my impression that an ocean ship is supposed to be under control.

Q. I say, to what extent is the effect of this displacement swell dependent upon the speed of the ship?

A. Well, that would depend on how many feet the ship was drawing.

Q. If the ocean-going ship, say, is traveling ten miles an hour, does it have a greater or less displacement swell than if it is traveling, say, five miles an hour?

A. Absolutely. Take a large ship going down through there ten miles an hour would draw the water ten or twelve feet off each side of the river, like that, especially on the other side, there, where they went close to the dike.

Q. And if it were going faster than ten miles an hour, what would it do in that case?

A. I wouldn't know. I wouldn't want to be there. [254]

Q. Would the hazard that you have referred to be increased, or lessened?

A. It is increased; the faster you go the more it is increased. In regards to the suction of vessels, of deep sea vessels, if I could vary away from that point, I worked at Ridgefield, Washington, which is about two miles and a half away from the Co-

(Testimony of Henderson B. Davis.)

lumbia River, and it will break lines, suction from ocean boats will break lines two miles and a half up the slough, up Lake River.

Q. That is to say, the lines on barges which are at a point two and a half miles from the ocean-going ship——

A. Boat houses, the floats.

Q. And is that a real hazard to river boats on the river?

A. I would say it would be in close quarters.

Q. Well, is that a really serious hazard in the operation of the river boats, that that can happen?

A. Yes, it can happen.

Q. If the lines on the barges are broken, then what do you have to do with your tow?

A. You have to make your tow up again. It is hard to tell where your tow is going to.

Q. And is this problem a more serious one in the nighttime than in the daytime?

A. Well, you can judge the speed of a vessel at daytime and you can't at nighttime.

Q. Would the hazard from displacement swell be greater or less [255] if the river boat is traveling up the east side of the river opposite Post Office Bar rather than the west side?

A. You would be further away. If you are over on the east side you are practically in the clear. You have got lots of room over there.

Mr. Young: You may cross examine.

May I ask the witness one more question, your Honor?

(Testimony of Henderson B. Davis.)

Q. Mr. Davis, are you familiar with the type of lights that are used on barges which are being towed by river boats? I refer particularly to a barge which would be on the nose of the towboat and another one lashed on the port side forward. In the nighttime what lights are customarily used on barges of that sort in the Willamette River?

A. I would put a light on either corner forward and a light on the corner that extends the furthest away from my boat.

Q. How many lights would that be?

A. Three lights.

Q. What color would they be? A. White.

Q. And would they conform to the practice which has existed on the river in doing so?

A. Yes.

Q. How long has that practice existed, to your knowledge?

A. Well, as long as I have been steamboating.

Q. And how long did you say that was?

A. Well, 1917 is what I started in. [256]

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Mr. Davis, or perhaps I should call you "Captain Davis"—what do they call you?

A. Me? Oh, it is hard to tell. They call me Birch, mostly. That is my middle name.

Q. Well, I will call you "Captain." You have been a towboat captain, haven't you?

(Testimony of Henderson B. Davis.)

A. Yes.

Q. Your whole experience has been with tow-boats, has it not? A. Yes.

Q. You have never been a pilot of an ocean steamer? A. Absolutely not.

Q. And you look on this question from the standpoint of the towboat man, don't you?

A. Yes, sir.

Q. Now, you said that it would be difficult for a towboat coming up on the right-hand side in the nighttime to tell how far she was off that old dike unless she used her searchlight. That was your testimony, was it not? A. Yes, sir.

Q. I want to call your attention to the beacons that there are on that right-hand shore right along the dike. There is one there, isn't there? That is the Post Office Lower, I think they call it. [257]

A. That is the one down in the bend, there.

Q. There is one down here at Gillihan's, isn't there? A. Yes, sir.

Q. And the two range lights of Post Office Bar, itself, are there.

A. Front and rear range lights here.

Q. What is the approximate distance from Gillihan's up the river to the front range light of the Post Office Range?

A. I wouldn't attempt to say.

Q. Can't you give me an idea?

A. No, I never measured it. When I got my license we didn't have to——

(Testimony of Henderson B. Davis.)

Q. Don't you know whether it is a mile or ten miles? A. It is not quite a mile.

Q. All right. That is near enough. Not quite a mile. Well, would you say three-quarters of a mile?

A. Is that particular that I know——

Q. No, not exactly. I will say it is less than a mile, isn't it? A. I would say it is.

Q. You may sit down for your own comfort. So that in a distance somewhat less than a mile there are four Government beacons along the line of that dike on that bank, aren't there?

A. Well, there is only one there that would tell you the distance from that dike. It is right on the dike. The Post Office Bar light in reality is the only light that is right on the dike.

Q. Well, this is true, Captain Davis, is it not, that the dike [258] substantially follows the bank, does it not?

A. Well, not the bank that you could see. It is in the water a little ways from that.

Q. A little ways from the bank. But it follows the line of the bank, does it not? A. Yes.

Q. And the beacons are substantially along the line of that bank, are they not, except possibly the front range of Post Office Bar?

A. Well, there is a dock sticks out down below.

Q. Tell me about the lights.

A. This light here—the Post Office Bar light is the only light that is on the dike.

(Testimony of Henderson B. Davis.)

Q. Well, how far is the light at Gillihan's from the dike?

A. I don't believe that the dike runs down that far, to Gillihan light.

Q. All right. Then we are not concerned with that. How far is the dike from the Post Office Bar Lower? A. That is right at the dike.

Q. Right at the dike. How far is the Post Office Bar Front from the dike?

A. I wouldn't say.

Q. Well, how close?

A. I wouldn't attempt to say.

Q. Only a few feet, is it not?

A. No, I couldn't answer that question because I don't know. [259]

Q. Fifty feet, three hundred feet?

A. I don't know how close.

Q. Don't you admit that those lights are all so placed that an up-coming boat can tell how far she is off that shore?

A. Not if you had to crowd in there, you couldn't tell.

Q. But you could tell, you say, if you used your searchlight? A. Used your searchlight.

Q. But you are forbidden to use your searchlight?

A. That is in any way that it would blind an on-coming vessel.

Q. To what rule are you referring?

A. To the Pilot Rules.

(Testimony of Henderson B. Davis.)

Q. Can you point it out? We have a copy here.

Mr. Wood: I am going to help him, your Honor. I know what it is.

A. It says "forbidden——"

Q. Look on page 34.

A. "Any master or pilot of any vessel who shall flash or cause to be flashed the rays of the searchlight into the pilot house of a passing vessel may be proceeded against in accordance with the provisions of section 4450, R. S., as amended, looking to a revocation or suspension of his license."

Q. All right. That rule forbids the flashing of a searchlight into the pilot house of an approaching vessel?

A. Or rays.

Q. All right. Forbids the rays of the searchlight from being [260] flashed into the pilot house of the approaching vessel. Isn't that it?

Mr. Wood: I will pass that up to your Honor.

Q. That is what it says, does it not?

A. The rays of the searchlight will hit the water and reflect up.

Q. All the rule says is that you must not flash your searchlight into the pilot house of the other man, does it not?

A. It says the "rays."

Q. All right. Now, do you mean to say that if you were coming up here on a tug that you couldn't flash your searchlight off at a right angle toward this bank to see where that dike was without blinding a ship that was coming up here half a mile away from you? Is that what you want——

(Testimony of Henderson B. Davis.)

A. It would have a tendency to blind him; yes, it would.

Q. You admit, do you not, that if you were coming up here and wanted to use your searchlight, you would flash it at right angles out on to the bank where the dike was, would you not?

A. It isn't necessary if you use the other bank to use the searchlight.

Q. Please answer that question. If you were coming up there and you wanted to know where the dike was—here is your ship coming up here like this—you would flash your searchlight off here at right angles on to the dike, would you not, if you wanted to know where the dike was?

A. If you stay over in the tow channel the dike wouldn't concern [261] you at all.

Q. Yes. We are not talking about the tow channel. I suppose you mean the shallow water on the other side.

Mr. Wood: I will ask the Court to instruct him to answer the question.

The Court: Yes. Answer the question.

Q. If you were coming up the west side how would you use your searchlight, if you used it at all, to find the dike?

A. I would use it right straight out from the side of the pilot house.

Q. Right angles? A. Right angles.

Mr. Wood: That is enough.

Q. Mr. Davis,—

(Testimony of Henderson B. Davis.)

The Court: Move the map back, Mr. Bragg.

Mr. Wood: Q. —you testified before the Steamboat Inspectors on the trial of Captain Reed, did you not? A. Yes, sir.

Q. At that time you said you were not working at that time, did you not? A. Yes, sir.

Q. You were out of a job at that time?

A. Yes, sir.

Q. And the last person or company you had worked for prior to that was the Western Transportation Company, was it not? [262]

A. That is right.

Q. And they are the owners of the Barry K, are they not? A. Yes, sir.

Q. How long had you worked for them the last time you worked for them?

A. Oh, I would say approximately eight months.

Mr. Wood: That is all.

Redirect Examination

By Mr. Young:

Q. Is your present work with the Shaver Transportation Company permanent so far as you know?

A. As far as I know, yes.

Mr. Young: I should like to ask this witness one more question I omitted on direct.

Q. In the event that you were proceeding down the Columbia River with a towboat and barge and you were coming up the Willamette River, what

(Testimony of Henderson B. Davis.)

course would you normally expect to follow after you got into the Willamette River?

A. Well, I would stay on the east bank all the way up. Q. You say "all the way up"?

A. All the way up past Post Office Bar clear to the St. Johns bridge.

Q. Now, why would you stay on the east bank all the way up until passing Post Office Bar?

A. Well, there is no use of running back and forth across the channel. [263]

Q. What do you regard as the most hazardous place of passage in the vicinity of Post Office Bar?

A. Well, any place in there, if you got down in there, would be hazardous.

Q. However, you would not cross over—if you come in from the Columbia River and proceed up the Willamette you say you would not cross over to the right-hand side of the Willamette first. Is that right? A. That would be the west bank?

Q. Yes, the west side.

A. No, we don't pass on the west bank at all.

Q. If you did come over to the west side of the river, then as you got up toward the dike which you have mentioned what would you do then?

A. Well, the only thing you could do then would be to cross over at Gillihan's to the east bank.

Q. And then as you got up the stream and past Post Office Bar entirely and were proceeding on up toward Terminal No. 4, what would you then do with regard to the position occupied by your boat on the river?

(Testimony of Henderson B. Davis.)

A. I wouldn't cross over to the west bank again. It wouldn't be necessary.

Q. In any event, if you started your passage up the river following the west bank, that would involve two crossings in order to avoid the hazards in the bend. Is that correct? [264]

A. Yes, it would.

Mr. Young: That is all.

Recross Examination

By Mr. Wood:

Q. Do you claim it is necessary to make two crossings if you cross over to the west bank at the mouth of the river? Do you claim you have to cross back?

A. If you went back to the west bank when you got up above the point of Post Office Bar it would be.

Q. Well, all right. What you mean, as I understand it, is this: if you were coming down the Columbia River from Camas and you turned into the entrance of the Willamette, and if you crossed over and held to the right in accordance with Article 25, that when you got up here further you would have to cross back to the west bank. Is that what you mean?

A. If you stayed on the west bank all the way up.

Q. If you stayed on the west bank all the way up?

A. Yes.

Q. Then you would not cross at all, would you?

(Testimony of Henderson B. Davis.)

A. Yes, but you would be down in the bight there at Post Office Bar where I don't want to go.

Q. All right. Suppose you were coming up the Willamette River from its mouth on the right-hand side, you could keep on that right-hand side all the way up without crossing at all, couldn't you?

A. Not to my idea, and be safe, you could not.

[265]

Q. Suppose you met a towboat coming down and you got a towboat going up. How do you pass?

A. There is all kinds of room. There is worlds of room over there for towboats to pass.

Q. I think there is worlds of room in that channel, too. I agree with you. There is worlds of it. plenty of it; just my contention. Please answer my question. Supposing you were coming up anywhere in that channel, from the mouth of the river up, and you got a towboat, a barge, towing barges, and you met a towboat with a tow coming down. How do you pass?

A. Most generally the towboat that is coming up stays on the east side and the other boat would pass down on the outside.

Q. You think they pass starboard to starboard?

A. Yes, sir.

Q. At what point?

A. At all of the points.

Q. You recognize that is a violation of the rules, don't you? A. Not necessarily.

(Testimony of Henderson B. Davis.)

Q. Do you know that the United States Steamboat Inspectors have actually held that to be a violation of the rules, not in this case but in tow-boat cases? Do you know that?

A. It says when it isn't dangerous.

Q. I want to know whether you know the local Inspectors in this district have found the pilot guilty if doing that.

A. I don't know what pilot they found guilty. They suspended [266] Captain Reed's license for one day. That is all I know.

Mr. Wood: I am not talking about this case.

The Court: Step down.

Mr. Wood: That is all.

(Witness excused.)

Mr. Young: Captain Lowery.

A. T. LOWERY,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Where do you live?

A. Portland, Oregon.

Q. And how long have you lived here?

A. All my life.

Q. Would you mind telling us how long that is?

(Testimony of A. T. Lowery.)

A. Fifty-six years.

Q. What is your occupation?

A. Columbia River pilot.

Q. How long have you been engaged in that work? A. Since 1927.

Q. What was your work prior to that time?

A. Running towboats on the river. [267]

Q. And how long were you engaged in that work? A. Since 1902.

Q. And do I understand that your river experience on the Willamette has been from the year 1902 up to the present time?

A. Yes, sir.

Q. As a Columbia River pilot do you handle any vessels other than ocean-going ships?

A. Ocean-going only.

Q. Prior to the time that you were doing that work, however, you were handling what sort of boats? A. River boats, all kinds.

Q. In connection with your work as a pilot, have you become familiar with what is known as Post Office Bar? A. Yes, sir.

Q. How frequently have you had occasion to pass Post Office Bar?

A. Well, on an average of twice a week, maybe three times.

Q. What is the range in size of vessels that you have had occasion to pilot over Post Office Bar? I refer to ocean-going ships.

A. You mean in the length?

(Testimony of A. T. Lowery.)

Q. Length and draft.

A. Well, I have piloted some of the largest that comes in here, 500 to 510 feet long. I piloted one ship down two years ago that drew 33 feet and 2 inches of water.

The Court: Q. 33—2? [268]

A. 33 feet and 2 inches of water.

Mr. Young Q. To the pilot of an ocean-going ship, what is the channel which you follow?

A. 35-foot.

Q. 35-foot channel. What consideration do you give to the 30-foot channel which extends beyond the 35-foot channel?

A. Not whatever. That is out of the channel.

Q. That is what?

A. That is clear of the channel.

Q. That is clear of the channel. To what extent have you had occasion to observe river boats with tows making use of the Willamette River in the vicinity of Post Office Bar?

A. It has always been a practice to keep to the east side.

Q. How many river boats would you say make use of that river? Could you give any estimate?

A. No, I couldn't.

Q. Is it a large, or small number?

A. Well, there is quite a number of them towing up and down there regular, barges, logs.

Q. You mentioned that the river boats stayed to the east side of the river? A. Yes.

(Testimony of A. T. Lowery.)

Q. How long has that been the practice?

A. Ever since I can remember.

Q. During all of the time that you have been on the river? [269]

A. Yes, sir.

Q. That is since 1902?

A. Yes, sir.

Q. Captain, in operating an ocean-going steamer, down the Willamette River and from the city limits of Portland toward the Columbia, what is the practice with regard to the speed of the ocean-going ships at that point?

A. Well, the vessel—various different drafts of vessel—deep draft—I usually run them half-speed until we get out of the Willamette. Vessels of light draft I usually run them around ten knots, ten to eleven knots.

Q. What do you know about the practice of other pilots with regard to the speed at which they proceed?

A. I suppose they do the same thing. I don't know what they do.

Q. Captain, what can you say from your experience both in the handling of river boats and of ocean-going vessels past Post Office Bar as to whether it is safe or practicable for river boats to proceed upstream on the west side of the river at that point?

A. I don't think that it is practical or safe to be over in that bend passing ocean-going ships.

Q. And will you explain your answer?

A. Well, various different reasons. There is a

(Testimony of A. T. Lowery.)

current in the river that naturally sets on that break-water along Sauvie's Island. The wind has a tendency to set a stern-wheeler and barges [270] over on to that, if the wind is blowing from the east. And if there is an up-coming ocean steamer, why he would be very close in passing, there, without the ocean-going steamer got well out in—across the channel.

Q. What is the effect of the displacement——

A. Did you say in-coming? In-coming ocean——

The Court: You are thinking of a tow going down and an ocean steamer coming in.

A. The tow up, ocean steamer coming up, too, both passing in the same direction?

Q. What would be the normal passage that way, both going in the same direction?

A. They would leave the boat and barge to the starboard side.

Q. To her starboard?

A. Yes.

Mr. Young: Q. What would you say as to the river boat coming upstream and meeting the ocean-going ship going downstream? A. Well——

Q. I am referring now to the question as to whether it would be safe or practicable for river boats to proceed upstream on the west side in light of the necessity, from time to time, of passing ocean-going ships going downstream.

A. Well, nothing more than the swell from the ocean-going steamer naturally rolls into the bend harder than it does on the straight-of-way, which would have a tendency to break up the river boat's

(Testimony of A. T. Lowery.)

[271] tow and cause her trouble there in the bend.

Q. Does the extent of the effect of the displacement swell depend at all upon the speed of the ocean-going ship?

A. It depends on the speed, draft, both.

Q. That is to say, the faster the speed and the deeper the draft, the greater the displacement swell?

A. Yes, sir.

Q. Are you familiar with the dike which is in the vicinity of Post Office Bar on the west side?

A. Well, I have seen it there a good many times.

Q. To what extent does that dike present a hazard to river boats which might be traveling upstream on the west side?

A. Originally that dike was built out of piling and rock, filled with rock. The piling now are mostly all rotted away and there is rock scattered around there on the bank.

Mr. Wood: Captain Lowery, will you speak a little louder? I cannot hear you. Raise your voice, please.

Mr. Young: Q. Well, what is your answer with regard to whether that presents a hazard to river boats?

A. I say originally that dike was built, it was built out of piling and rock and brush piled in there, and the piling now are rotted off and the rock and stuff if strewn around in that bend in there on the bank.

Q. Does that make it more hazardous than it was previously?

(Testimony of A. T. Lowery.)

A. It would if there was no rock in there. You don't know what [272] is in that bend now.

Q. What is the effect on the operation of a stern-wheel river boat proceeding upstream on the outside of the curve at the river in that point, assuming that it is traveling over toward the west shore. What is the tendency of the ship with reference to side-slipping?

A. Well, stern-wheelers, light draft, the wind has more effect on her.

Q. Would you say that a 10- to 15-mile breeze from the east at that point would have an effect upon the operation of a stern-wheeler with barges in tow, which barges have deckhouses about twenty feet high?

A. I would say, yes, some.

Q. Now, to what extent, if any, would the hazards that you have mentioned exist with respect to a river boat traveling up the river at this point on the east side?

A. The river boat traveling up the river on the east side, he is over next to the other shore. He is in shoaler water and he can get further away from the channel.

Q. Do you know about how much shoal water there is on the east side at this point which the river boat could be in and be in the clear of the main ship channel?

A. Approximately four hundred feet.

Q. And in your view is it safe for an ocean-

(Testimony of A. T. Lowery.)

going ship to travel anywhere within that four hundred feet from the east shore? [273]

A. It is not if she is drawing any water, as she would be considered out of the channel if she was in that four hundred feet.

Q. Captain, are you familiar with Article 25 of the Pilot Rules referring to steam vessels' use of narrow channels?

A. I am.

Q. What is your view as to whether or not that Article 25 is absolute and always gives to a steam vessel going down the stream at this particular point the absolute right to make a passage port to port?

A. I think conditions has a lot to do with that.

Mr. Wood: A little louder, please, Captain.

A. I say conditions have a lot to do with that. If you think it is unsafe and impracticable, I think you can vary from those rules.

Mr. Young: Q. In other words, if you are taking an ocean vessel down the channel of the Willamette River past Post Office Bar, in light of the circumstances which you have indicated as to the dangers to a river boat in using the west side of the stream, would that be a factor which would have a bearing upon your duty in the operation of the ocean ship?

A. I don't understand your question.

(The last question was read by the reporter.)

A. I don't understand your question.

Q. Let me reframe the question. Suppose you are traveling down the channel with an ocean-going

(Testimony of A. T. Lowery.)

ship, and you meet a river boat coming upstream. Under Article 25 would you regard yourself as [274] within the limits of Article 25 if you signalled for a port to port passage?

A. If the river boat was coming upstream?

Q. Yes.

A. In what position?

Q. On the east side.

A. If the river boat was well to the east side I would keep him on the starboard side and disregard the rules.

Q. You would keep him on your starboard side?

A. Yes, sir, and disregard the rules.

Q. And why would you do that?

A. I wouldn't want that river boat crossing my bow.

Q. Are you familiar with the term "kick water"?

A. Well, that is current from the propeller, yes.

Q. Suppose that an ocean steamer puts on a right rudder. What is the tendency with respect to the kick water as to the direction that it will take?

A. It will throw half of it off to one side and the other half straight back, as a rule. If she has a swing in her, it acts a little bit different.

Q. Captain, assume that in the nighttime you were proceeding down the channel past Post Office Bar and you saw coming from the opposite direction on the east side of the river some vessel with two white mast lights, and you could see also either

(Testimony of A. T. Lowery.)

her red or green side lights, and, in addition, down near the water's [275] edge forward you could observe at least two white lights. What would you understand was the identity of that boat that was approaching you?

A. I would consider that was a tug with barges alongside or ahead.

Q. And what can you say as to whether or not the use of white lights on the forward corners of the barges which are either on the nose of the tug-boat or lashed to either port or starboard side is common practice in the river? A. It is.

Q. And what color are those lights?

A. White.

Q. Do pilots here in the Columbia and Willamette rivers understand that those are the lights that are ordinarily used?

A. As far as I know, they do.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Right on that last question about what lights should be on the barges, do you know what Pilot Rules, Inspectors' Rules, rather, govern that question?

A. I have read it in the Pilot Rules, yes.

Q. Could you point them out to us? We have the Pilot Rules here. A. I have no glasses.

Q. You mean it is impossible for you to read at the present time without your glasses?

A. I have to have glasses to read. [276]

(Testimony of A. T. Lowery.)

Q. Would you recognize the rule if I read it to you? A. Possibly would.

Q. Is the rule the same for barges as it is for scows?

A. I don't know what classification you would put scows and barges or anything else in.

Q. I haven't asked you that. I asked you whether the rule is the same for them.

A. I have an idea it is.

Q. How would you classify these craft that the Barry K was towing?

A. Well, I would class them as barges.

Q. Barges. I will ask you if this is the Inspectors' Rule about lights on the barges. "Barges or canal boats shall, when being propelled by pushing ahead of a steam vessel, display a red light on the port bow and a green light on the starboard bow of the head barge or canal boat, carried at a height sufficiently above the superstructure of the barge or canal boat as to permit said side lights to be visible; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the outside barges or canal boats." Is that the rule about barges?

A. Isn't that rule in regards to when the steamer's lights is not visible over the top of the barge?

Q. No, I think not. Do you think that is the rule, or not?

A. I wouldn't say that is the rule. I think when a steamer's side lights in visible over the structure

(Testimony of A. T. Lowery.)

of a barge, I don't [277] think it is necessary to carry your additional side lights on your barges.

Q. Now, do you know what the rule is for scows?

A. Practically about the same, as far as I know.

Q. No, it is very different. At least I understand it is. I will ask you if this is the rule for scows: "Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles." Is that the rule for scows?

A. That is the rule we have always followed, either scows or barges.

Q. That is? A. Yes.

Q. Then you think the lights should be visible five miles, do you?

A. Well, from two to five miles.

Q. Let's get that. The rule says it shall be visible five miles, does it not? [278]

A. Well, it is better all around if they were visible ten miles.

(Testimony of A. T. Lowery.)

Mr. Wood: I will have to ask the Court to instruct him to answer that question.

The Court: Well, is this cross examination?

Mr. Wood: Yes.

The Court: As to what?

Mr. Wood: Cross examination about lights.

The Court: I will have to interpret the rule in the last analysis.

Mr. Wood: Well, the witness has testified as far as the practice on this river goes the lights are the same for either scows or barges.

The Court: He did not say that first.

Mr. Wood: But he said it now.

Q. That is what you said, is it not, Captain? Is that not what you testified to?

A. Practically the same, yes.

Mr. Wood: All right. Then I read in the rule for lights on scows——

The Court: What is the question?

Mr. Wood: Q. Well, the question is, should not the white lights carried on barges or scows on this river be visible five miles and show all around the horizon?

The Court: To comply with the rules?

A. No, they shouldn't, not all around the horizon. [279]

Mr. Wood: Q. Leave out "all around the horizon," then. Shouldn't they, to comply with the practice of this river and the rule, be visible five miles?

A. They should be visible from two to five miles.

(Testimony of A. T. Lowery.)

Q. Do you mean that is in accordance with the practice on the river, or that is in accordance with the rule?

A. That is in accordance with the practice on the river.

Q. But not in accordance with the rule, is it?

A. I don't know about accordance with the rules. That is in accordance with the practice on the river for years.

The Court: Q. There are not many places on the river where you can see five miles, are there?

A. No. There are some places, very few straight-of-ways that you can see a distance of five miles. It is mostly curves which shut out your vision.

(The last answer was read by the reporter.)

Mr. Wood: Q. I should like to stand up this close to him because I cannot hear. Captain Lowery, from 1902 to 1927, you were a river towboat man, here, weren't you? A. I was.

Q. Can you tell me whom you worked for, or did you work for yourself?

A. I worked for the Willamette-Columbia River Towing Company. I worked for the Crown Willamette Paper Company.

Q. And the Crown Willamette Paper Company——

A. Western Transportation Company. [280]

Q. ——is the Western Transportation Company, is it not? They are the same, in effect. Is that true?

A. How is that?

(Testimony of A. T. Lowery.)

Q. The Western Transportation Company is the subsidiary company of the Crown Willamette and does its towing? A. Yes.

Q. And you worked for the Western Transportation Company?

A. I did. And I worked for Shaver Transportation Company and I worked for Smith at Rainier.

Q. And are you a member of the Columbia River Pilots Association? A. I am.

Q. And is it a fact that most of you men in that association have come up from the towboat school?

A. It is.

Q. Now, you mentioned this old dike and the rock that had originally been piled behind it. You evidently are familiar with the history of it. Do you know who built it?

A. United States Engineers, according to my understanding.

Q. Yes. They built it there as an aid and improvement to navigation, did they not?

A. To keep the bank from sliding.

Mr. Wood: Yes.

The Court: What was intended? What was sought to be accomplished by it?

Mr. Wood: He says to keep the bank from sliding into the channel. [281]

A. It was to keep vessels from washing the bank down into the channel. It was a protection for the bank.

The Court: Q. Rather than for deepening the channel?

(Testimony of A. T. Lowery.)

A. Yes.

Mr. Wood: Q. No, is this not a fact? They dredged the channel there at Post Office Bar and then to keep the bank from sluffing down into the dredged channel they built the dike along the bank?

A. That is right. It was built there originally before they dredged, and afterwards they dredged it. This dike protects the wash of the bank from sliding into the river. That is what it was originally intended for.

The Court: Q. Keeping it from shoaling into the water?

A. Yes, exactly. To keep it from sliding into the river and shoaling it up.

Mr. Wood: Q. Now, is the substance of your testimony, as you gave it, here, that the up-coming tugboat and tow, if she elects a starboard passage, should keep over in the shoal water entirely out of the ship channel?

A. She should keep clear out of the ship channel. That was customary. We always followed it. In coming up, we would keep clear out of the ship channel as far as we could.

Q. Yes. So that if the up-coming towboat blows two blasts, the obligation on her is to keep entirely out of the channel, is it not?

A. It is to keep as far out of the channel as possible. [282]

Q. Well, you said there are four hundred feet of shoal water there, so it is possible for her to keep over next to the bank, is it not?

(Testimony of A. T. Lowery.)

A. To keep over as far as she can to keep out of trouble, yes.

Q. Well, a towboat like the Barry K with two barges in tow, if she should keep over as far as she can, she should keep over in that shoal water, should she not?

A. Yes, to the shoal water side, yes.

Q. And in the shoal water? A. Yes.

Q. That is her obligation on that kind of a passage?

A. That is what I would figure on making that kind of a passage, to keep well out of the channel if possible.

Q. Do you understand, Captain Lowery, that when a vessel in a narrow channel blows two blasts, it is only an initial request on her part that the other vessel accede to it? Do you understand that?

A. Yes, sir.

Q. It is just an invitation to the other ship to pass starboard to starboard, is it not?

A. It is to indicate that he wants to pass starboard to starboard, yes.

Q. And it is an invitation to the other ship to accept that proposal, is it not?

A. He can accept it or he can call the other man down and reverse [283] his signals, but he can't reverse them without blowing him a danger whistle.

The Court: Without which?

A. Without blowing him a danger whistle.

Q. Four whistles?

A. Four whistles, and then reverse his whistles.

(Testimony of A. T. Lowery.)

Mr. Wood: Q. Now, I was struck by one answer you made. You said that Article 25 requires vessels to keep to their own right-hand side, but you can vary from the rules. You said something like that. A. Yes.

Q. What did you have in mind when you said that you can vary from the rules?

A. Well, if I should figure that it would be dangerous on that side or become involved in the collision or anything, I could cross over as long as it was safe on the other side.

Q. There is a rule that covers that specifically, is there not? A. I think so.

Q. What? A. I think so.

Q. It is the "Special Circumstance" rule, is it not? A. Yes.

Q. Do you know the number of it?

A. No, not right offhand. I have read it.

Q. Is it not Rule XI? [284]

A. I think so. I am not sure. I have heard it read a good many times.

Q. Anyway, that is the rule that you have in mind when you say that it is permissible to vary from Article 25? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, does not Rule XI—

Mr. Wood: Pass that to the Court. I will use my copy.

Q. —read this way: "In obeying and construing these rules due regard shall be had to all Dan-
gers of Navigation and Collision and to any Special

(Testimony of A. T. Lowery.)

Circumstances which may render a departure from the above rules necessary in order to avoid immediate danger''? A. Yes, sir.

Q. In other words, to come under that rule, the danger to be avoided must be immediate, must it not?

A. Well, it can be immediate, or if you are navigating with a boat and barges and you think it might be dangerous I don't see why you shouldn't vary from those rules. That is your own opinion.

Q. Well, that is a matter for the Court. Now, I wanted to ask you about your testimony. If you were on an ocean-going steamer coming down at night, and an up-coming towboat blew you, and he was well to the east side, you would keep him there. That is what you said, was it not?

A. Yes. [285]

Q. I want to ask you if you are on an ocean-going steamer up here coming down on the Post Office Bar range on the upper end of the range here about where I am pointing, and you see a ship, a towboat—I will begin again, because you did not see where I was pointing.

Mr. Young: How about counsel for libelant?

Mr. Wood: Oh, he is not so important.

Mr. Young: He doesn't count.

Mr. Wood: Q. Can you see the chart?

A. Yes.

Q. Can you recognize these two as the Post Office Range lights? A. Yes.

Q. And this is the Post Office Lower light?

(Testimony of A. T. Lowery.)

A. Yes.

Q. And Gillihan is down there?

A. Yes, sir.

Q. Now, if you were on an ocean-going steamer coming down up here on the range, the upper end of Post Office Range where I am pointing, and you saw the lights of a towboat down here, say, perhaps a mile below you in the bend, four thousand feet below you, anywhere down in there, can you tell at that distance whether that towboat is on the east or west side of the river?

A. Not exactly. You wouldn't be sure.

Q. That is what I thought. Take the stand again, please. You testified before the Steamboat Inspectors at Captain Reed's trial, did you not? [286]

A. Yes, sir.

Q. I want to refer to two or three pages of your testimony there and ask you whether you still agree with it.

Mr. Young: What page?

Mr. Wood: I am referring first to page 91. Well, I will not read that because he has already testified to the same thing that the up-coming ship is obliged to keep in the shoal water.

The Court: Who reported that hearing?

Mr. Wood: This was reported in part by the regular office reporter that the Steamboat Inspectors have and then Mr. Young was not satisfied with that, quite, and he got in Mr. Shoemaker, was it not?

Mr. Young: Well, I object to the manner in

(Testimony of A. T. Lowery.)

which counsel has stated. This counsel knows very well what happened at the time. The regular reporter for the Inspector was quite unable to take down the testimony with any degree of rapidity, and it became very difficult for both counsel and the Inspector to be certain whether the reporter was making an accurate transcript, and I therefore did suggest that we should get another reporter, and counsel, himself, was perfectly agreeable to it being done, and it was done, and Ray Shoemaker was the man who took the testimony.

Mr. Wood: Well, I do not know why you are irritated at what I said. The fact is——

The Court: Well, now, I understand. [287]

Mr. Wood: The fact is that Mr. Shoemaker took the last part of it.

Mr. Young: Counsel seemed to think I was running the whole show. As a matter of fact, he was quite as interested in getting an accurate transcript as I.

The Court: I imagine it was even Stephen.

Mr. Young: That is all I am calling for, is even Stephen.

Mr. Wood: As a matter of fact, Mr. Shoemaker was employed by Mr. Young. I had nothing to do with it.

Mr. Young: What counsel means is that we paid the bill, but he was the official reporter.

Mr. Wood: Q. I am going to begin to read at the top of page 92, Captain Lowery, and ask you

(Testimony of A. T. Lowery.)

whether this is what you testified to, and then I will ask you whether you still agree with it. The question by the Inspectors:

“Q. According to your experience on an ocean ship coming down the river what was the obligation as to the side of the channel you are sailing on?

“A. To keep to the starboard or right side, in the middle of the channel.

“Q. Approaching Post-office Bar what is your obligation?

“A. To keep to the channel, or a little to the right side of the middle of the channel.

“Q. To keep to the right-hand side?

“A. Or the middle of the channel.

“Q. Suppose then, captain, you are approaching Post-office Bar on this ocean ship and keeping to the right-hand side of the channel, and supposing you meet this tug boat who is on the left-hand [288] side of the channel, which vessel is the obligated vessel to get out of the way?

“A. Well, the one that has the other on the portside.

“Q. Which vessel would be that in this case?

“A. It depends on the distance apart they are.

“Q. Supposing they are within three-quarters of a mile of each other, and in this position, which one is the obligated one?

(Testimony of A. T. Lowery.)

“A. I would say the river boat, according to the custom of the river there; the river boat would follow the course of the river.

“Q. But which one is the obligated?

“A. According to the law, the ship would be,—would have the right-of-way.

“Q. Therefore, you recognize, then, that the river boat going up on the left-hand side of the river, has to keep away from the ocean boat, is that true?

“A. According to law, yes. To avoid a collision you can vary from that law, too.

“Q. She has to keep away from the ocean boat, does she not?

“A. Ordinarily do, yes.

“Q. Suppose she fails in her efforts to keep away from the ocean boat, then who is at fault?

“A. Well, I don't know. In what way?

“Q. If she fails to carry out her obligation and a collision follows, then who is at fault?

“A. Well, I wouldn't see any basis for a collision there if the river boat follows the river bank.

“Q. Will you please stick to the question? Read the question.

“The Reporter: (Reading) “If she fails to carry out her obligation and a collision follows, then who is at fault?

“A. The river boat.

“Q. (by Ins. Joachim) The river boat would be at fault?

(Testimony of A. T. Lowery.)

“A. Yes.” [289]

The Court: Who asked those questions?

Mr. Wood: The Inspector, Captain Joachim.

Q. Now, did you so testify? A. I did.

Q. And do you still agree with that?

A. I still agree with that. The river boat should get out of the way. That refers to the channel.

Mr. Wood: I know.

That is all.

Redirect Examination

By Mr. Young:

Q. Captain Lowery, in the testimony which counsel read to you, I wanted to repeat just one of the questions and one of the answers.

“Q. According to your experience on an ocean ship coming down the river what was the obligation as to the side of the channel you are sailing on?

“A. To keep to the starboard or right side, in the middle of the channel.”

Now, keeping to the starboard or right side in the middle of the channel would place your down-going ocean steamer, say, how far from the east bank in the vicinity of Post Office Bar?

A. Approximately 550 feet.

Q. And would that still give ample clearance for the river boat to pass going upstream following the east shore?

A. In my opinion, yes. [290]

Q. When you testified here that the river boat should go over into the shoal water, throughout

(Testimony of A. T. Lowery.)

what distance from the east bank would you regard that shoal water to commence?

A. Four hundred feet.

Q. Four hundred feet? A. Yes.

Q. Then if the Barry K at the time of this collision was, let us say, two hundred feet from the east bank, would you regard it being in shoal water, within the meaning of your answer?

A. Clear of the channel, yes.

Q. Clear of the channel? A. Yes, sir.

Q. And when you speak of "channel," you refer to which channel? A. 35-foot contour.

Q. In answer to questions put by counsel you have stated that the dike was built by the United States Engineers on the west side of the bend opposite Post Office Bar in order to prevent washing away of the bank. Is that correct?

A. That is originally what it was built for.

Q. Yes. Is there any reason why, at that particular place, there should be more washing away of the bank than at other places along the river?

A. On account of the swells of ocean-going ships when they are coming down there, washing in there. The current in the river cuts in there. It washes in there. The current goes right down [291] against that bank and washes around in there. It always cuts away after a freshet in the river.

Q. Why does the current tend to cut away the bank more at that place than at other places, however?

(Testimony of A. T. Lowery.)

A. It doesn't. There are other places in the river that it will cut away as much as that, but it is diked, too.

Q. Does the fact that there is a bend in the river at this point have anything to do with this washing away?

A. It does. It does on any bank.

Q. In reading to you the Pilot Rules with regard to lights on barges and scows, I will ask you whether you have read the second paragraph on page 22 of the Pilot Rules which reads as follows: "When nondescript vessels known as scows, car floats, lighters, barges or canal boats, and vessels of similar type, are towed alongside a steam vessel, there shall be displayed a white light at the out-board corners of the tow." Have you read that article?

A. I have. I have read that book through.

Q. Is there any certainty among the people on the river as to precisely what those Pilot Rules mean with regard to lights on barges, scows, and lighters?

A. Not to my knowledge.

Q. Counsel inquired as to whether you had graduated up from a river pilot to a Columbia River pilot. I will ask you whether or not in your judgment, experience as a river pilot tends to [292] make you more efficient as a pilot of ocean-going vessels?

A. That is the way they figure it.

(Testimony of A. T. Lowery.)

Q. It is a pretty good school to go through first. Is that the idea?

A. I think so. I think I went through as good a school as any of them.

Q. With reference to the pilot rule which counsel referred to, of a scow having a light on it which could be seen five miles all around the horizon, at the particular place where this accident occurred, is there any place in through there where the pilot of one vessel would have an opportunity to see the other ship for a distance of five miles or anything like that? A. No, sir.

Q. Assume that the Barry K, let us say, were in a position near Post Office Bar 3 light where I am now pointing on this map, and the Pennsylvanian were away up on the Post Office Range in the position that I am here indicating on the Engineers' map, could you give any estimate as to the distance it would be possible to see across there, having in mind the existence of the bend?

A. No, I can't give any distance. I can measure it on the chart, there.

Q. Would you do that, please?

A. You can measure it on the chart.

Q. In other words, you are satisfied with whatever the chart shows on that? [293]

A. Yes.

Mr. Young: Very well. That is all.

Mr. Wood: If your Honor please, I should like to ask him a few more questions on a subject I did not cover.

(Testimony of A. T. Lowery.)

Recross Examination

By Mr. Wood:

Q. Captain Lowery, I think you testified about some especially large steamer that you piloted down there, drawing thirty feet or something like that?

A. 33 feet and 2 inches.

Q. That is an exceptionally large ship, is it not?

A. She is.

Q. And that is an exceptional draft in this river, is it not?

A. It is.

Q. The ordinary draft of laden ocean steamers going out of this river is perhaps about 24 feet? That is a fully loaded ship.

A. Twenty-seven feet, Mr. Wood.

Q. What?

A. Twenty-seven feet. You take the average of twenty-seven.

Q. Very well. Twenty-seven feet. And the 30-foot channel was designed for that class of navigation, was it not?

A. The Government Engineers only maintain a 35-foot project.

Q. Now?

A. And a 500-foot width.

Q. That really is byplay. What I was coming to was this: can [294] large steamers, large ocean steamers such as the one you have described, navigating the river, there, especially if they are going down with the current, they are not so easily handled as a river boat with a tow, are they, with a barge alongside?

A. No, sir.

(Testimony of A. T. Lowery.)

Q. They are much harder to handle, are they not? A. Yes, sir.

Q. They certainly are. And river steamers—I mean ocean steamers—regardless of their size, meeting at Post Office Bar, always pass port to port, do they not?

A. Ocean-going ships, yes.

Q. And they always have, have they not?

A. Yes, sir; to my knowledge they always have.

Q. Even when the channel was only 500 feet wide they passed port to port there?

A. Yes.

Q. And even when it was only 300 feet wide they passed port to port there? A. Yes, sir.

Q. And now the 30-foot channel is about 800 feet wide there, and the 35-foot channel is about 700 feet there?

A. Lower Post Office Bar, the 35-foot project runs 625 feet. At the upper end it runs 700 feet, where you make the entrance.

Q. And the 30-foot channel, according to the legend on this chart, is 8— [295]

A. We don't recognize the 30-foot channel. Pilots don't recognize that.

Q. Now, ocean-going steamers there pass port to port. Suppose the tugs with heavy tows, river steamboats with heavy tows—I do not mean log rafts, I mean barges or scows, laden—suppose they meet there, one coming up and the other coming down. How do they pass?

(Testimony of A. T. Lowery.)

A. I don't know. We used—we used to pass portside too, keep well over on the east side. We always towed on the east side.

Q. But the tugs and tows, there, when they meet they pass port to port, do they not?

A. On the east side. We used to do it. I don't know what they are doing now. I don't know what their practice is now.

Q. Well, when your experience ceased they were still passing port to port?

A. They were. Sometimes they would pass starboardside too, but not very often.

Q. So that an up-coming river boat with laden barges, if she met a down-coming river boat with a tow, she would go up on the right-hand side, would she not?

A. She would.

Mr. Wood: That is all.

A. She would keep the other one on her port side.

Mr. Wood: That is all. [296]

Redirect Examination

By Mr. Young:

Q. Did I understand you to state that the average depth of an ocean-going ship using this river is about 27 feet?

A. The average all the way through, yes. It runs about 26 to 27 feet.

Mr. Wood: Q. That is a fully laden vessel?

A. Yes, fully laden.

Mr. Young: Q. Is it safe for an ocean-going

(Testimony of A. T. Lowery.)

vessel drawing 27 feet of water to be using that 30-foot channel?

A. I wouldn't consider it so.

Q. Why not?

A. Because obstructions on the bottom, such as logs.

Q. Even though the channel is called a 30-foot channel, what is the fact as to whether there may be irregularities in the bottom that would present a hazard?

A. Well, there could be irregularities, an irregular bottom, and you might strike a lump in there that is not dredged. It is not taken care of by the Government Engineers.

The Court: Q. They just take care of the 35-foot?

A. They just take care of the 35-foot projects, and not the 30.

Q. So in time that 30-foot water would not be 30-foot water?

A. No, it is subject to fills.

Mr. Young: Q. Do you know how recently there has been any dredging in the vicinity of Post Office Bar? [297]

A. Well, it was either a year ago or two years ago, one of the two. I don't remember now. I know there was a dredge in there cutting out.

Mr. Young: That is all.

Mr. Wood: What rule on page 22, Mr. Young, did you purport to read? I can't find it.

(Testimony of A. T. Lowery.)

Mr. Young: 28, the page is.

Mr. Wood: 28. Oh.

Recross Examination

By Mr. Wood:

Q. Captain Lowery, counsel read to you this paragraph in the Inspectors' regulations on page 28: "When nondescript vessels known as scows, car floats, lighters, barges or canal boats, and vessels of similar type, are towed alongside a steam vessel, there shall be displayed a white light at the out-board corners of the tow." Do you remember his reading you that? A. Yes.

Q. What did you say about that? Did you say that was the rule here?

A. That is the rule we have been using here, yes. They have been using a white light on each outside corner forward and aft on it.

Q. Isn't it a fact that that rule as promulgated by the Inspectors applies to lights for barges and canal boats in tow of steam vessels on the Hudson River and adjacent waters and Lake Champlain? Page 26. Is that right, or do you know?

A. Well, it might be. [298]

The Court: He would have to look that up.

Mr. Wood: I guess he would. Anyway, your Honor will see——

A. Well, that is——

Mr. Wood: ——it does not apply to these waters at all.

That is all, Captain Lowery.

The Court: Step down again. Thank you.

(Testimony of A. T. Lowery.)

Redirect Examination

By Mr. Young:

Q. In other words, what they are using out here are the rules that do apply on the Hudson River. That is the answer, is it not?

A. Yes, sir; the customary rules to us.

The Court: That is all.

(Witness excused.)

Mr. Young: Mr. Raymond Peck.

The Court: Mr. Wood, Jr., what was the name of that case where those boys were in a small boat on a Sunday?

Mr. Erskine B. Wood: Constance Chandler.

The Court: What was the other party's name?

Mr. Erskine B. Wood: I do not remember it right this instant. The suit was against the SS. Constance Chandler.

The Court: Will you get me the title of that case and will you get it so I will have it tomorrow morning? Of course, you go down to the beach tomorrow morning while the rest of us stay [299] here. Send them up by your father, will you, the decisions that you gave me in that hearing about the admissibility, about the competency of Inspectors' conclusions in cases of this kind? We used an Inspector's report in that. That is in evidence in that case.

Mr. Erskine B. Wood: I remember we did, yes.

The Court: And you cited me some A B—what do they call them?

Mr. Erskine B. Wood: A. M. C.

The Court: One or more, proving the competency of those reports as advisory.

Mr. Erskine B. Wood: Yes, I think I can find that.

The Court: If I had the name of the case I could find them out of my own file, but without that other party's name I cannot do it.

Mr. Erskine B. Wood: Lang.

Mr. Wood: Lang against the Constance Chandler.

Mr. Young: I presume counsel will supply me with a copy of the decisions, also, your Honor.

The Court: If he does not, I will give them to you.

RAYMOND P. PECK,

produced as a witness in behalf of the Libelant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Where do you live? [300]

A. 2324 Southeast Ivon Street.

Q. What is your occupation? A. Mate.

Q. Employed by whom?

A. Western Transportation Company.

(Testimony of Raymond P. Peck.)

Q. How long have you been with the Western Transportation Company?

A. About nine years.

Q. What license do you carry?

A. Mate of inland steam vessels.

Q. That is a Federal license? A. Yes.

Q. And you have held that since what time?

A. 1925.

Q. Were you on board the Barry K the night it had its collision with the Pennsylvanian on February 1 last? A. I was.

Q. And was your position that of mate at the time? A. Yes, sir.

Q. Were you on watch at the time the accident happened? A. No, sir.

Q. When did you go off watch?

A. I think just above the Interstate Bridge.

The Court: Are you going to produce that other man, the lookout who went back to call the crew? He is here, is he?

Mr. Young: Oh, yes. [301]

Q. What was that?

A. Just above the Interstate Bridge at Vancouver.

Mr. Wood: What happened above the Interstate Bridge?

Mr. Young: He went off watch at that time.

A. Went off watch at that time.

The Court: This is one of the men that the lookout went to call?

(Testimony of Raymond P. Peck.)

Mr. Young: Yes, that is right.

Q. Mr. Peck, when you went off watch, what did you do?

A. I think I went back to the galley and got a glass of milk and went to bed. I think we were just going through the Railroad Bridge when I went to bed.

Q. What is the last that you remember then before the accident happened?

A. Well, we had gone through the Railroad Bridge before I had gone to sleep, because I heard the exhaust, the vibration of the exhaust of the bridge.

The Court: A little louder, a little louder, so that Mr. Wood can be sure to hear and I can hear, too.

Mr. Young: Q. Where was your room on the Barry K where you went to bed?

A. Just aft, below the pilot house, and a little aft on the port side.

Q. Can you show the Court that position by examining Libelant's Exhibit 5? [302]

A. Yes. It would be the second window.

The Court: Counsel had better see this.

A. This is right by the door. That is the window in the door.

Mr. Young: Q. Which deck is that?

A. That is the promenade deck, the main deck.

Q. That is the deck above the deck which is at the water line?

(Testimony of Raymond P. Peck.)

A. The lower deck is the cargo deck.

The Court: Show Mr. Wood the window again.

A. This window right here.

Mr. Young: Did your Honor see that?

The Court: Yes.

Mr. Young: Q. After going to sleep, what do you next remember?

A. Well, what woke me up was the danger signal.

Q. And the danger signal by what boat?

A. The Barry K.

Q. How many blasts was that?

A. Four or more.

Q. When you heard the danger signal, what did you do? A. I walked out on deck.

The Court: Q. What do you mean, "four or more"?

A. I think there was four. I heard four.

Q. Were those given rapidly?

A. Rapidly.

Q. A good deal like a danger signal on a railroad train? A. Yes. [303]

Mr. Young: Q. Did you hear any further signals from the Barry K?

A. Yes. After I had gone back to my room I did.

Q. What did you hear then?

A. I heard starboard passing whistles and danger signals and three whistles last.

Q. In other words, you heard four sets of whistles. Is that correct?

(Testimony of Raymond P. Peck.)

A. I think that is correct. I don't just remember what rotation they went in, but I heard danger signals and starboard passing signals and——

Q. When you went out on deck, which side did you go out on? A. Port side.

Q. What did you see?

A. I looked across the bow and I seen the lights of a ship, and I run back to my room and put on my clothes.

Q. How far away was that ship when you saw it?

A. Well, I couldn't say. Probably a thousand feet.

Q. What lights did you see?

A. I didn't notice any lights on it. I just seen lights and that was all.

Q. You just saw lights generally but didn't identify them? A. No, I didn't.

Q. What would you say was the approximate position, if you know, of the Barry K with reference to the east shore of the river at that time?

[304]

A. Well, she was running towards the east shore.

Q. Could you from where you were determine how close you were to the shore?

A. Not exactly, but I should say around 200 feet.

Q. Was the Barry K in motion when you went out on the deck?

(Testimony of Raymond P. Peck.)

A. She was in motion when I went out on deck.

Q. Did you notice any change in the speed of the Barry K?

A. Not at that time.

Q. Did you later? A. Yes.

Q. When?

A. After he had blown the three whistles.

Q. And then what happened?

A. Well, she began to slacken her speed.

Q. Did you hear any whistles from the approaching steamer? A. I did not.

Q. They may have been blown and you not have heard them?

A. That is right. They could have been blown.

Q. Are you sure that you heard all of the whistles blown by the Barry K?

A. I think I did. The first I heard was the danger signal. She must have blown a starboard passing whistle before that.

Q. You did not hear that, however?

A. No.

Q. Now, where were you at the time the collision occurred? [305]

A. I was in my room.

Q. And what did you do after that?

A. After the collision occurred?

Q. Yes.

A. I went down on deck to see if there was any damage done to the boat.

Q. At the time you went down on deck, did you see the Pennsylvanian then?

(Testimony of Raymond P. Peck.)

A. The Pennsylvanian was still pushing the Barge No. 22 across our nose.

Q. You did not see the collision, itself, did you?

A. No.

Q. What was the position of the Pennsylvanian in the stream at that time?

A. She was headed across pretty sharply towards the east side.

Q. Was she in contact with one of the barges?

A. She was in contact with Barge No. 22.

Q. And where was Barge 22 in relation to the tug?

A. Barge 22 was just a little bit off the port bow that she was pushing.

Q. Had it broken loose from the tug?

A. It had broken loose from the Barry K.

Q. Did you watch the course of the Pennsylvanian after that? A. I did not.

Q. At this particular time did you notice where you were with [306] reference to the east shore?

A. No, I didn't.

Q. What did you do then?

A. I went down in the hold the first thing.

Q. What did you do down there?

A. I looked to see if there was any bad leaks.

Q. Did you find any?

A. A small one in the stem.

Q. How long did you remain down below?

A. Oh, probably ten or fifteen minutes.

Q. When you came up, where was the Barry K then?

(Testimony of Raymond P. Peck.)

A. The Barry K was going across the river.

Q. Toward which side?

A. Towards the west side of the river.

Q. Did you see the Pennsylvanian then?

A. I did not.

Q. Did you see either of your barges?

A. No, I didn't look for the barges at that time.

Q. What did the Barry K do when she got across the river? A. She tied up.

Q. Where?

A. At the dolphin. She grabbed a line on the dolphin and eased herself into alongside of the jetty.

Q. Do you know the number of the dolphin or what the name of it is?

A. No, I am not supposed to know. I am not a navigating officer. [307]

Q. How long did you remain over there?

A. Oh, I should say an hour. I don't know the exact time, but I imagine about that.

Q. Why did the boat stay over there?

A. They had broken an oil line.

Q. When did you next see the barges?

A. I seen the barges as I came up out of the fire hole, and they were repairing, back in the engine room, had part of the burner in the vice.

Q. Where were the barges when you came up?

A. They were just off the port side and below us, away below, down in the bight of that bend down there.

(Testimony of Raymond P. Peck.)

Q. Now, below you on which side of the river?

A. They were on the west side of the river.

Q. Was there any other boat there in the river at that time?

A. The cruiser come just shortly after that, just a few minutes.

Q. Came up shortly after what?

A. After I went to the gangway door of the Barry K.

Q. You mean shortly after the accident?

A. Well, shortly after we had tied up.

Q. Oh, yes. Now, when, following the accident, did you have, or did you have any opportunity to notice whether there were any lights on the barges?

A. Yes, there were lights on the barges when they were laying down alongside the west shore down there. [308]

Q. Could you see them from where you were?

A. I could see them.

Q. What lights did you see?

A. I think I seen two white lights. I couldn't tell what position they were in on the barges or anything about that.

Q. It was dark except for those lights?

A. Yes.

Q. Do you know how far you were from those lights when you saw them?

A. Not exactly; possibly two or three thousand feet.

(Testimony of Raymond P. Peck.)

Q. Now, did you see these barges when they were up at Terminal No. 4 later on?

A. I did.

Q. And were you on the barges?

A. I was.

Q. What lights did they have on them then?

A. They had all of the lights intact the same as they had before.

Q. What lights were those and where were they located?

A. Let's see. 22 was laying out on the side of 24, and there were two lights on 24 and one light on 22. I don't know just exactly the position they were laying in there at Terminal 4. I don't remember.

Q. What was the nature of those lights?

A. White lights.

Q. And what kind of lanterns?

A. Storm lanterns, they called them. [309]

Mr. Young: Would the clerk please give me the exhibit which is the lantern? Oh, here it is.

Q. Will you examine Libellant's Exhibit 8 and tell us whether that is a lantern of the kind that you saw at that time? A. That is the kind.

Q. Now, were all of the three lights that you saw on the barges the same type of light as this?

A. That is right.

Q. How close were you to those lights at that time? A. I was on the barges.

(Testimony of Raymond P. Peck.)

Q. What would you say as to the condition of the globes in those lights?

A. I would say they were clean.

Q. Had you had anything to do with the placement of those lights on the barges? A. No.

Q. Who had done that? Do you know?

A. Mr. Kelly.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. When you came out of your room before the Barry K blew her three blasts to show that she had reversed her engines, the Barry K was within 200 feet of the shore?

A. Oh, approximately. I wouldn't say for sure, but—— [310]

Q. I mean that is as near as you can say?

A. Yes.

Q. And headed diagonally toward the east shore?

A. Not diagonally. She was headed over towards the east shore a little bit.

Q. And still going full speed?

A. She was still going full speed.

Q. You say she was not headed diagonally. Unless she was headed straight forward she must have been headed diagonally.

A. Well, yes. In towards the east shore.

Q. And the other ship was then a thousand feet away, about?

(Testimony of Raymond P. Peck.)

A. I would guess that. Maybe more. Maybe less. I didn't pay any attention to how far away she was.

Mr. Wood: That is all.

The Court: Step down.

(Witness excused.)

The Court: I suggest the morning recess.

(Whereupon at 9:45 a recess was taken.)

The Court: The reporter has asked me whether he should plan to be here Saturday. Do you gentlemen know now your wishes as to that?

Mr. Wood: I am willing, entirely, to accommodate ourselves to the Court's wishes and convenience.

Mr. Young: That is satisfactory with me, your Honor. [311]

The Court: We are not accustomed to working in court on Saturday.

Mr. Young: Call Mr. Williams, John Williams.

JOHN WILLIAMS,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Mr. Williams, where do you live?

(Testimony of John Williams.)

A. 601 North Knott Street.

Q. And how long have you been in Portland?

A. About sixteen years.

Q. What is your occupation?

A. I am a deckhand.

Q. Employed by whom?

A. At the present time, Shaver Transportation Company.

Q. Whom were you employed by prior to your present employment?

A. Western Transportation Company.

Q. And how long were you with Western Transportation?

A. Oh, off and on for about five years.

Q. Were you in the employ of Western Transportation Company and on the Barry K at the time of its collision with the Pennsylvanian?

A. I was.

Q. What was your work on the Barry K?

A. I was the deckhand. [312]

Q. Were you on watch at the time?

A. I was.

Q. When did you go on, do you remember?

A. At 6:15, the evening prior.

Q. And were you on duty at the time that the accident, itself, happened?

A. I was.

Q. As the ship was proceeding up the Willamette River, what, if anything, first called your attention to the fact that there might be another ship there?

(Testimony of John Williams.)

A. Well, I was on the lower deck near the fire hole talking to the fireman on watch, and I heard a starboard passing whistle blowed from the Barry K?

Q. Is that the first whistle that you noticed?

A. That is the first thing that I heard.

Q. And did you know at that time that you were in the Willamette River? A. I did.

Q. Headed upstream? A. Yes.

Q. You mentioned the fire hole. Where is that located?

A. That is in the forward part of the boat on the main deck.

Q. I will hand you Libelant's Exhibit 4 and ask you to state whether you can indicate to the Court where the fire hole is with reference to the boat as you see it in the picture. [313]

A. Yes, I can. There is the man standing at the fire hole.

Q. Hole, or hold? A. I wouldn't know.

Mr. Young: I am not sure, myself.

The Court: Q. You mean the boilers are back there?

A. Yes. Right aft this bulkhead, here.

Mr. Young: Q. In this potograph which you just examined it shows two doors in the forward part of the boat. In this picture the doors are open. Were they open on that particular evening, do you remember?

A. Well, they were partially closed. I don't

(Testimony of John Williams.)

know whether they were entirely closed or not. They might have been opened a crack.

Q. In any event you were aware of a starboard passing whistle given by the Barry K?

A. Yes, I was.

The Court: Q. What was that signal?

A. It consisted of two blasts of the main whistle.

Mr. Young: Q. At that time did you look out?

A. Not at that time, no.

Q. Did you later? A. Yes.

Q. When did you look out?

A. Well, there was a recall or a danger whistle blown.

Q. By whom?

A. By the Barry K very shortly after the starboard passing whistle was blown. [314]

Q. Did you hear any whistle from the other ship?

A. No, I, personally, heard no whistle from the other ship.

Q. Did you at any time hear any whistles from the other ship?

A. Yes, I did, but it was quite some while after.

Q. After you heard the danger whistle given by the Barry K, did you then go out on deck?

A. I then stepped out on the bow.

Q. And what did you see?

A. I saw a ship approaching from upstream.

Q. About how far away was it?

(Testimony of John Williams.)

A. Oh, roughly I would say a thousand feet.

Q. Did you notice her lights?

A. I saw lights but I couldn't say what they were.

Q. Where would you say the Barry K was with reference to the shoreline at that time, or did you notice?

A. Well, exactly from where I was standing at that time I couldn't see the shoreline. I couldn't see the east shoreline. I could see the west shoreline, and, judging from the distance that we were from the west shoreline, I would say that they were somewhere near the east shoreline.

Q. Was one of the barges between you and the east shoreline? A. Yes.

Q. Now, what whistles, if any, did you hear after the Barry K blew the danger whistle?

A. I heard no whistle—I heard no whistle from the approaching ship. [315]

Q. Did you hear any more from the Barry K?

A. Yes. Then there was another starboard passing whistle blown from the Barry K.

Q. And then the answer from the Pennsylvanian that you heard? A. Not any answer.

Q. Any further whistles then from the Barry K?

A. There was a starboard passing whistle then blown from the Barry K.

Q. And then what next did you hear?

A. The next whistle that I heard was three blasts from the main whistle of the approaching ship.

(Testimony of John Williams.)

Q. Is that the first whistle that you had noticed from the approaching ship? A. It was.

Q. And were there any further whistles then from the Barry K after you heard the three blasts?

A. Answered by three blasts from the main whistle of the Barry K.

Q. Do you know about how far apart the boats were at that time, or were you in position to see?

A. I was in position to see they were quite close at that time. The exact number of feet I couldn't say, but they were quite close.

Q. Do you know how fast the Barry K was proceeding upstream at about the time you heard the first whistles which she blew?

A. Oh, I really couldn't say. I imagine it was five or six miles an hour. [316]

Q. Were you able to arrive at any conclusions as to how fast the other boat was proceeding?

A. No.

Q. And where were you when the collision occurred?

A. When the collision occurred, at the very moment that the collision occurred, I believe I was in the aft bunk room of the Barry K calling the crew, but I couldn't say positively that that is where I was.

Q. Who was the watchman on board the boat that night? A. Mr. John Kelly.

Q. And did you see him that evening?

A. Yes.

(Testimony of John Williams.)

Q. Where was he when you noticed him?

A. Well, right at that time, or prior to the accident, he came down on the lower deck to see if I was ready and on watch, ready to pick up a barge, and that was——

Q. Where was that barge to be picked up?

A. At the West Oregon mill.

Q. And then after that did you see him any more before the collision?

A. I couldn't say for sure. I believe that I saw him on the upper deck, forward of the pilot house, but I couldn't say that definitely. I know I heard him up there, but I don't know for sure whether I saw him or not.

Q. You mentioned you were calling some of the crew, yourself. A. Yes. [317]

Q. How did you happen to do that?

A. Well, I saw that a collision was inevitable and I run aft to call the crew.

Q. You did it on your own responsibility?

A. I took it upon myself. And I believe at that time that there was an alarm whistle being blown from the Barry K, from our deck whistle. That is a small whistle aft on the lower deck to signal to the deckhands, and also it is used as an alarm whistle.

Q. Who operates that alarm whistle?

A. That is operated by the man on watch in the pilot house.

The Court: Q. You mean by the pilot?

(Testimony of John Williams.)

A. Yes, the pilot or Master, whichever is on watch.

Q. You mean whoever is at the wheel?

A. Yes, sir.

Mr. Young: Q. Did you actually see the collision?

A. The actual collision, no, I did not see.

Q. When the collision occurred, were you aware of it from the fact of the violence at all?

A. Yes, I was aware of it.

Q. And after the collision occurred, did you notice the position of the other vessel?

A. Yes, quite soon after. I went,—as I said previously, I went aft to call the crew out, and then after the collision I went out on deck and I could see the steamer that was later identified as the Pennsylvanian on the east side of us. [318]

Q. And was she in motion at the time?

A. She was.

Q. Do you know how fast she was going?

A. It would be very hard to say.

Q. Did you notice any change in the speed of the Barry K before the collision occurred?

A. Oh, yes.

Q. Tell the Court what you noticed.

A. Well, as we were proceeding upstream, I don't know exactly at what in reference to the whistles and such that the Barry K was stopped, but the engines were stopped. Now, I don't know how soon that the vessel, itself, came to a stop and

(Testimony of John Williams.)

lost its headway, but then her engines were thrown astern, and at the time of the collision or very soon before the collision the engines were going full speed astern and the pilot was swinging the stern of the boat upstream as much as he could so that the ship would not hit the boat, itself, but instead would hit the barges.

Q. Is that where the collision in fact occurred, do you know? A. Pardon?

Q. Did the collision in fact occur between the steamer and the barge, one of the barges?

A. Yes, the ship hit Barge No. 22, which was on our nose at the aft gangway door.

Q. Do you know whether the Barry K was in motion or standing still when the collision occurred? [319]

A. I believe that she was going astern.

Q. Going astern? A. I believe so.

Q. Now, had you that evening at any time before the collision observed what lights there were on the barges? A. I had.

Q. What occasion did you have to do that?

A. Well, the barge lines are very often, when they are in mills like at Camas and other docks, the lines on the barges, when they are letting, well, they are very often thrown over the side, they are just let dangle, and it is part of the duties of the deckhand on watch to make sure that these lines are picked up and put on deck of the barge. They are made fast to the barge.

(Testimony of John Williams.)

Q. And did you have occasion to do that on that night?

A. And—I did. I went around the barges and I picked up the lines.

Q. What time in the evening was it that you did that?

A. It was after we left Camas, somewhere between Camas and Portland—Camas and Vancouver.

Q. Is that the only occasion you had to do that shortly before the accident occurred?

A. As I remember, that is the only occasion I had to go on the barges.

Q. What lights did you see on the barges at that time?

A. I saw one white light on the forward starboard corner of Barge No. 22, one white light on the port forward corner of Barge No. 24, and one white light on the after port corner of Barge No. 24. [320]

Q. What color were those lights?

A. White lights.

Q. How high were they above the decks of the barges?

A. Oh, roughly I would say six feet.

Q. And how strong was the light which they cast? Would you describe that?

A. Quite strong.

Q. Were you that evening in any position where you could observe those lights from a distance?

(Testimony of John Williams.)

A. No, I was not.

Q. Now, after the accident happened, did you see the barges?

A. Yes, I saw the barges after the accident happened several times.

Q. Where were they after the accident?

A. The first time I saw them after the accident was immediately after the accident. Barge No. 22 was being pushed downstream on the nose of the steamer *Pennsylvanian*, and Barge No. 24 was adrift—exactly in what position in relation to the other barge I couldn't say, but I believe it was a bit further downstream, and I could see them float on downstream at a few different times, working around the boat. Later I saw them brought upstream by the tug *Cruiser*, and later saw the same barges at Terminal 4, where they were tied up by the tug *Cruiser*.

Q. Did you notice where those barges came to rest after they were broken away from the *Barry K*? A. No, I did not. [321]

Q. At Terminal No. 4 did you notice the lights on the barges? A. I did.

Q. What lights did you see then?

A. I saw the same three lights and in the same three positions.

Q. Where were those lights with reference to the exact corners of the deckhouses on those barges?

A. As near to the exact corner as possible.

(Testimony of John Williams.)

Q. Do you know whether those lights were visible either to a person standing to the side of them on the forward end or on the side of the barge, itself, looking forward? A. They were.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Mr. Williams, this West Oregon mill, where you were going to pick up the third barge, is at Linnton, isn't it? A. Yes, it is.

Q. About how far upstream was that from you, from the place of the collision?

A. Oh, I couldn't say exactly. It is less than a mile, in the vicinity of a mile.

Q. Did you have anything to do with the care of these lights on the barges?

A. It wasn't my duty.

Q. There was no occasion for you to notice them at all, was there? [322]

A. Well, the only occasion that I would have to notice them is any time that a man goes around and inspects the barges, picking up lines and such, he usually makes a practice of noticing all things that—to see that they are in order, the doors of the barges closed and if the lights are right.

Q. What did you mean by saying that these lights were fixed as near the corner of the barge as possible? To illustrate, if that is the corner of the house of one of the barges, was there any bracket out there on which the light hung?

(Testimony of John Williams.)

A. No, there was no bracket, but very, very close to the corner, without being right on the corner, right aft of the forward corner, there, there is nails.

Q. How far aft?

The Court: Q. Which way is the barge pointing?

A. This would be the upstream end of the barge. Right as close to the corner as it could be.

Q. This would be the starboard forward corner of the barge? A. Yes, right here.

Mr. Wood: Q. How far back from the corner would the nail be driven?

A. Right at the corner. If this was the corner, here, it would be over six inches.

Q. Six inches back of the corner?

A. Or maybe not even that far. Close enough that they could be seen with a pretty good angle forward. [323]

Q. But if the nail was driven six inches back from the corner, from the starboard side, and the lantern was hung something like that, the only place it would show would be forward and on the starboard side, wouldn't it?

A. From a distance of a couple of hundred feet that would show practically to the middle of the barge, and at a further distance you could see it quite a great distance to the other side of the barge.

Q. Well, it is hanging about approximately the way you think it was, wasn't it?

(Testimony of John Williams.)

A. No, it is hanging further back than I think it was, hanging about like that, as close to the corner as it could be.

Q. Was it any part of your duties to notice whether the lanterns were clear or not?

A. Oh, I really wouldn't say that it was part of my duties, but, as I stated before, we always watch for things like that.

Q. Will you say that the globes were as clean as this lantern exhibited in court is? Will you testify to that?

A. I couldn't say it was as clean as that, but it was clean.

Q. Would you say they were hanging six feet above the deck of the barges?

A. Approximately just about where a man would hang them out.

Q. How far would that be above the water?

A. Oh, I really couldn't say. I don't know how far it is, exactly, from the water's edge to the deck of the barge.

Mr. Wood: That is all. [324]

Redirect Examination

By Mr. Young:

Q. Just a moment, Mr. Williams. Will you take the lantern and hold it on the edge of this upright, and place that lantern, now, just about where you think it was at the time that you saw the lanterns on the barges?

A. Just about like that.

(Testimony of John Williams.)

Q. Now, from where your finger is, will you take this rule and measure the place where your finger is to the end of this upright?

A. Four inches.

The Court: Q. What finger did you measure from?

A. The center finger.

Q. In other words, then, the bight of the lantern was against a nail which was approximately four inches from the forward end of the barge corner. Is that right?

A. Just about that, I imagine.

Mr. Young: That is all.

(Witness excused.) [325]

JOSEPH M. SCHAUBLE,

produced as a witness in behalf of the Libellant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name to the Court, please.

A. Joseph M. Schauble.

Q. And in whose employ are you?

A. Western Transportation.

Mr. Wood: A little louder, please, Mr. Schauble.

A. Western Transportation.

(Testimony of Joseph M. Schauble.)

Mr. Young: Q. What is the nature of your work?

A. Marine engineer.

Q. How long have you been a marine engineer?

A. Since 1919.

Q. What license do you hold?

A. Non-condensing river license, 750 gross tons.

Q. Were you on board the Barry K the night of its accident with the Pennsylvanian?

A. I was.

Q. And what were your duties at that time?

A. Assistant engineer, first assistant.

Q. Were you on watch at the time the accident happened? A. I was.

Q. Do you remember about when you went on watch?

A. Well, it would be just a little after midnight. [326]

A. And then you would remain on watch until how long? A. 6:15.

Q. Where were you when you were on watch, what part of the Barry K?

A. In the engine room.

Q. And where is the engine room located?

A. On the after end of the boat.

Q. On the lower deck?

A. On the lower deck.

Q. From your position there, is it possible for you to hear whistles of the Barry K or other whistles? A. Yes, you can.

(Testimony of Joseph M. Schauble.)

Q. Do you recall the Barry K starting up the Willamette River that particular night?

A. Well, I don't just recall the start up the Willamette, of course.

Q. Well, did you notice any whistles from the Barry K after the boat was in the Willamette River at any time?

A. Oh, yes. I heard——

Q. What whistles did you hear?

A. Well, I recall not all of the whistles, but the danger signal.

Q. You recall the danger signal?

A. Yes, sir.

Q. Do you remember how many danger signals you heard?

A. No, not exactly.

Q. Did you hear more than one?

A. Yes, I am positive I did. [327]

Q. Did you hear any signals from the Barry K other than danger signals?

A. Well, I heard other signals, but I don't know just what they were.

Q. I see. Now, is there any means of communication between the pilot house and your place in the engine room?

A. We have a speaking tube, yes.

Q. And is there a gong or a bell, also?

A. Yes, sir.

Q. Did you receive any signals from the pilot house at any time after you heard this danger signal, the danger whistle?

A. Well, I heard—got a stop bell and full speed astern.

(Testimony of Joseph M. Schauble.)

Q. You got a stop bell and did you respond to that stop bell immediately?

A. Absolutely, yes.

Q. At the time that you received the stop bell, do you know about what the forward speed of the Barry K was?

A. No, I wouldn't know.

Q. In any event you answered the stop bell immediately? A. Yes, sir.

Q. And what did you do at that time with regard to the engines?

A. Well, just stopped the engines and immediately following I got a back-up bell full speed astern.

Q. The back-up bell came immediately later, afterwards. Is that right?

A. Yes, that is right. [328]

Q. And then did you respond to that bell promptly? A. Yes, sir.

Q. Were you aware of the happening of the collision, itself? A. No, sir.

Q. You didn't feel the collision at all?

A. Oh, yes; sure.

Q. That is what I mean.

A. Yes, you bet.

Q. You did not see the collision, did you?

A. No, you couldn't see the collision.

Q. When did you stop the engines with reference to the time of the collision? Could you estimate that time?

(Testimony of Joseph M. Schauble.)

A. Well, it wasn't very long. I wouldn't think it would be over a couple of minutes if it was that long.

Q. Do you know whether or not the Barry K had completely lost way by the time that the collision occurred?

A. Oh, no. I couldn't say that.

Q. You couldn't say as to that? A. No.

Q. Did you at any time hear any whistles from the other steamer? A. No, I never.

Q. They may have been blown and you not heard them? A. Oh, it could have been, yes.

Q. Could there have been whistles on the Barry K that you did not hear? [329]

A. Yes. Sure there could have.

Q. Did you see the other boat at any time before the collision occurred? A. Before? No.

Q. After the collision occurred did you see the other vessel?

A. I just got a shadow of it through the gangway door; that is, I could see it was an ocean boat, was all I could see.

Q. Was the other boat in motion when you saw it? A. Well, I couldn't tell.

Q. Did you see the other boat at any time after that? A. No.

Q. Your duties require you to remain there in the engine room. Is that right? A. That is it.

Mr. Young: You may cross examine.

(Testimony of Joseph M. Schauble.)

Cross Examination

By Mr. Wood:

Q. Mr. Schauble, were you alone in the engine room, or did you have anybody assisting you?

A. No, I was by myself.

Q. Did you have to handle both the port and the starboard engine by yourself?

A. They both handle from the same throttle.

Q. Have you a bell book showing the bells that you received?

A. We don't keep records of bells. We don't keep records of the [330] bells as they are rang.

Q. Is it not a practice on the Barry K to keep an engine room bell book?

A. Not as long as I have been on the boat.

Q. You keep no record of the bells at all?

A. No.

Q. Is it not customary on river boats to keep a bell book? A. I have never heard of it.

Q. You said you did not know the forward speed of the Barry K. Perhaps you interpreted the question to mean the forward speed through the water, but you know she was running with her engines full speed ahead, do you not, up to the time she got the stop bell? A. Yes, sir.

Q. You said you got a stop bell, then a backing bell, the backing bell following on the stop. That is rather usual, is it not, on all ships to give a stop bell before they give the reversing bell?

A. Yes.

(Testimony of Joseph M. Schauble.)

Q. In other words, it is not customary on any ships to reverse full speed astern from full speed ahead without an intermediate stop, is it?

A. No, that there, they are made, they stop and then——

Q. Do you know what the horsepower of the engines of the Barry K are?

A. Not exactly, no.

Q. Well, have you been engineer on other river boats in the Columbia and Willamette rivers? [331]

A. Oh, yes.

Q. You are familiar with that type of boat, are you? A. Yes.

Q. And the Barry K is a powerful boat of that class, is she not?

A. Well, yes. She is a good boat.

Mr. Wood: That is all.

Mr. Young: Just a moment, please.

Mr. Wood: Mr. Young, in respect to this thing of the bell book, which he says he doesn't have, have you a copy of a log book, not a copy, but have you the original log?

Mr. Young: I have the original log both of the engine room and the pilot house.

Mr. Wood: Well, at some convenient time——

Mr. Young: I have them right here.

Redirect Examination

By Mr. Young:

Q. Mr. Schauble, will you examine this book which I am handing you and tell me whether you know what that book is?

(Testimony of Joseph M. Schauble.)

A. It is the log book.

Q. What is it?

A. That is the log book of the engine room.

Q. Log book of the engine room? A. Yes.

Q. Is that for February 1, 1941?

A. Yes. [332]

Q. Whose handwriting are those items in?

A. Where the collision occurred it is mine.

Q. That part is yours? A. Yes, sir.

Mr. Young: We offer this in evidence, your Honor. I should like, however, if it is introduced in evidence, to have the opportunity of substituting a copy.

The Court: Q. What day of the week did this accident occur? A. Saturday, February 1.

Q. Early Saturday morning?

A. 12:55 Saturday morning.

Mr. Wood: It is my understanding, your Honor, that log books are not competent testimony or evidence on behalf of the ship that offers them. They may be used against the ship or they may be used by a witness who kept the log to refresh his memory, but the log book, itself, is not evidence. I do not know that I am going to insist on the objection yet,—I do not think I am—but I wish to make my position clear.

The Court: Why?

Mr. Wood: Because I do not know that I am going to make the objection or not.

The Court: I will not rule until you make up your mind what you want to do.

(Testimony of Joseph M. Schauble.)

Mr. Wood: Very well, your Honor.

Mr. Young: If the Court please, I am not insisting that the [333] book go in evidence. I produced it because some question arose with reference to the log. The only point I want clear is that I am willing that the book go in evidence, and the fact that it is not in evidence is no circumstance to be held against our position.

The Court: I understand you are withdrawing the offer?

Mr. Young: Yes, your Honor.

Mr. Wood: I want to ask him something about it.

Mr. Young: All right.

Mr. Wood: Mr. Schauble, in the left-hand column of your book, there, at the top, there are the letters "AR." Does that mean "Arrived"?

A. Arrived.

Mr. Wood: At that time? A. Yes.

Mr. Wood: And what is on the second column?

A. That is departure, or "Left," it says here.

Mr. Wood: So according to this log you noted the collision at 12:55 A. M., and then you departed from some place at 2:15?

A. Yes. Well, we shoved right across the river from there.

Mr. Wood: Is that what you mean, that you remained tied up over there at the other side of the river until 2:15? A. Yes, sir.

Mr. Wood: Did you go back to the mouth of the river? A. Yes, we went back to telephone.

(Testimony of Joseph M. Schauble.)

Mr. Wood: Back to the mouth of the Willamette? [334] A. Yes.

Mr. Wood: And where did you telephone from there, some house?

A. Oh, they have a station there that they operate.

Mr. Wood: Now, this entry, here, "Post Office Bar, hit SS. Pennsylvanian 12:55 A. M." has been erased and rewritten, has it not?

A. Yes. I got Pennsylvanian spelt wrong the first time. That there is how I happened to do that.

Mr. Wood: Is that the only reason you made the erasure? A. Yes, sir.

Mr. Wood: That is all.

Mr. Young: It wouldn't be the first time that the word "Pennsylvanian" has been misspelled I should say.

That is all. Witness excused.

(Witness excused.)

Mr. Young: At this time, if the Court please, I wish to inform opposing counsel that I have here the original log book of the Master. If counsel wishes to examine it he is at liberty to do so.

Mr. Wood: I will at a later time; not right this minute.

Mr. Young: The only point is, if you have any questions you want to ask about it I should like to have them asked while Captain Williams is still here. [335]

Mr. Wood: Well, after all, Captain Reed is a more important man, is he not?

Mr. Young: Well, Captain Reed will be here, but this is in Captain Williams' handwriting, I believe.

Mr. Wood: Then I should like to look at it. Is he not going to be here after today?

Mr. Young: I was hoping to excuse him today. He is not in the employ of the Western Transportation Company and wants to get back to his work.

I want to correct a statement I made, your Honor. This is in Captain Reed's handwriting.

Mr. Wood: Well, then I will ask Captain Reed anything about it that may be necessary.

Mr. Young: Call Mr. Leach.

The Court: Write this down, Mr. Maxwell, while the witness is coming up here: 1932 A. M. C. page 1247. That is what Mr. Wood cited me in the good ship Chandler case as authority for admission of the Inspectors' report.

TOM LEACH,

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Do you live in Portland?

A. Yes, sir. [336]

(Testimony of Tom Leach.)

Q. And what is your occupation?

A. Deck hand.

Q. In whose employ are you at present?

A. Oh, Oregon Steel Company, shipyard.

Q. Oregon Steel? A. Yes, sir.

Q. Prior to the time that you first went with the Oregon Steel, were you with the Western Transportation Company? A. I was.

Q. In what capacity? A. Deck hand.

Q. And how long did you hold that job?

A. About 1934.

Q. Up to when? A. Last Monday.

Q. Last Monday? A. Yes, sir.

Q. Were you a deck hand on board the Barry K at the time of the collision with the Pennsylvanian? A. I was.

Q. Were you on watch at that time?

A. No, sir.

Q. When did you go off watch?

A. Six o'clock in the evening.

Q. And do you remember when you went to bed? [337] A. No, I can't say.

Q. In any event were you in bed when the Barry K came up the Willamette River prior to the time of the accident?

A. You mean was I in a bed?

Q. Yes. Were you in bed then?

A. Yes, sir; I was.

Q. Whereabouts were you sleeping on the boat?

A. I was sleeping aft in the bunk room.

(Testimony of Tom Leach.)

Q. How far aft?

A. Extreme aft of the bunk room.

Q. What called your attention to there being another ship in the river before the collision?

A. I didn't hear nothing until the night watchman woke me up.

Q. Who was the night watchman?

A. John Kelly.

Q. And when he woke you up, did you hear any whistles of any sort? A. No, sir; I didn't.

Q. Did you later? A. No, sir; I didn't.

Q. What did you do?

A. I got up and put my clothes on.

Q. And did you go out on deck?

A. No, sir. When we hit it knocked me down.

Q. Then what did you do?

A. Then I went out on deck. [338]

Q. And when you went out on deck, did you see the other vessel? A. No, sir; I did not.

Q. Did you see the barges that had been with the Barry K?

A. I seen the barges floating downstream.

Q. Where were they?

A. As well as I can remember, I was about half asleep, and I think it was on the port side, on the —on the starboard side, I should say.

Q. And was the Barry K in motion when you went out on deck? A. I couldn't say.

Q. You were a little sleepy at that time, I take it. A. That is right; I was.

(Testimony of Tom Leach.)

Q. At any time when the barges were floating away, did you notice whether there were any lights on them? A. Yes, sir; there were lights.

Q. What lights did you observe?

A. White lights.

Q. And do you know where they were located?

A. Well, I know where they should have been. I couldn't say at that time whether they were on that barge or not.

Q. How many lights do you remember seeing?

A. Two lights.

Q. Two lights? A. Yes, sir.

Q. And did you see those barges close up at any time later that [339] evening or later in that morning, rather?

A. I seen them tied up at Terminal 4.

Q. Did you notice the lights at that time?

A. The lights were still burning.

Q. And how many lights did you notice then?

A. Three lights. I think three lights. Yes.

Q. Now, were those lights lights of the kind that we have a sample of here in the court room?

A. Yes, sir.

Q. And do you know about where they were located on the barges? A. Yes, sir.

Q. Where? A. Right on the corner.

Q. On which corner?

A. Well, on the port side.

Q. Of which barge? A. 24. Forward.

Q. Port side forward in the corner of 24?

(Testimony of Tom Leach.)

A. Yes, sir.

Q. And was there any other light on that same barge? A. Yes, sir; aft of 24.

Q. And where was it aft?

A. On the port side.

Q. At the corner? A. Yes, sir. [340]

Q. Was there any light on Barge 22?

A. Barge 22? I think on the starboard side of the forward barge on the corner.

Q. And that was where with reference to the corner? A. Yes, sir.

Q. Where with reference to the corner?

A. On the starboard side.

Q. I mean, was it right at the corner, or was it on the side, or on the bow?

A. She was right on the front of the barge.

Q. Right on the front of the barge?

A. Yes, sir.

Q. Could you illustrate that by taking this lantern and a pencil to indicate about the position of those lights? We will just imagine that the pencil—pardon me just a moment. What were they fastened to? A. A nail.

Q. A nail. Just imagine, now, that this pencil is the nail and take this lantern, and then come to the end of this upright and place the nail in about the position that you would regard the light to have been. A. Well, sir,—

Q. We will say we are now pointing to the starboard side of Barge 22, and around this corner would be the forward part of Barge 22. [341]

(Testimony of Tom Leach.)

A. Is the starboard part? I would say about here. The nail was drove in and up, and this is fixed, would hang something like this.

Q. Did any part of the light, itself, extend out around the forward part of the corner?

A. That is something I couldn't say.

Q. You couldn't say about that? A. No.

Mr. Young: You may cross examine.

Mr. Wood: No cross examination.

(Witness excused.)

Mr. Young: Mr. Melvin Young.

MELVIN YOUNG

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. You are Mr. Melvin F. Young?

A. Yes, sir.

Q. And by whom are you employed?

A. Western Transportation.

Q. In what capacity? A. Chief engineer.

Q. What license do you carry?

A. Chief engineer. [342]

Q. And how long have you held such a license?

A. About twenty-five years.

Q. Does that entitle you to act as chief engineer on river boats in the Willamette and Columbia rivers? A. Yes, sir.

Q. Were you the chief engineer on board the

(Testimony of Melvin Young.)

Western Transportation Company's boat Barry K at the time of its collision with the Pennsylvanian?

A. Yes, sir.

Q. Were you on board the boat at the time of the accident? A. Yes, sir.

Q. Were you on watch then? A. No, sir.

Q. Who was on watch? A. Mr. Schauble.

Q. When did you go off watch?

A. I went off about a quarter after twelve.

Q. And did you go to bed? A. Yes, sir.

Q. Were you in bed when the collision occurred?

A. Yes, sir.

Q. What first called your attention to anything happening on the Willamette River?

A. Well, they run a stopping bell and a back-up bell and three whistles that he was going astern full speed. [343]

Q. Where was your room on the Barry K?

A. About the fourth room down on the port side.

Q. That is on the second deck?

A. Yes, sir.

Q. It was the four blasts of the whistle of the Barry K that woke you? A. No, three.

Q. Three blasts? A. Yes.

Q. Did you hear any danger signal by the Barry K?

A. I heard one distinctly. That is all. I wouldn't say if others were blown.

Q. When was this danger signal that you heard distinctly blown with reference to the three whistles that you heard?

(Testimony of Melvin Young.)

A. Just a little before the three.

Q. The first signal you heard, then, was the danger signal. Is that right? A. Yes, sir.

Q. Then the next one was the three whistles?

A. Three.

Q. Did you hear any answering whistles at all from any other boat? A. None at all.

Q. May there have been some that you did not hear? A. I couldn't say.

Q. Did you go out on deck after you heard the danger signals? [344]

A. Yes. I went out on deck when I heard the stopping bell and she was backing up.

Q. Did you see Mr. Kelly at any time just before the collision?

A. Kelly just went by the door and says, "Get out. We have collided with a steamship."

Q. And what was Mr. Kelly doing at that time?

A. He was going forward.

Q. Was the Barry K in motion at the time the collision occurred, do you know?

A. She was practically stopped.

Q. And did you see the collision?

A. No, sir.

Q. Did you feel it? A. Yes, sir.

Q. Did you see the other vessel at any time before the collision? A. No, I didn't.

Q. When did you first see it, if at all?

A. What is that?

Q. When did you first see the other vessel, if at all? A. I never seen her at all.

(Testimony of Melvin Young.)

Q. You did not see her even after the accident?

A. I went back and changed my clothes, and by the time I came up she had gone.

Q. Did you then go down below?

A. Went down below. [345]

Q. What did you do after that?

A. Worked on the oil pipe to the burner and fixed it.

Q. How long did that take?

A. About an hour.

Q. Where did the Barry K go following the collision?

A. She went across on the west side.

Q. Did you notice the barges at all in connection with the Barry K? A. No, I didn't.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. What is the power of the Barry K?

A. Between 550 and 600.

Q. Is that a well-powered tugboat?

A. Yes, it is pretty good for a boat that size.

Q. She used to run on the Lewiston run, did she not?

A. Yes, she was up there for quite a while.

Q. It requires rather an extra well-powered boat to run on the Lewiston run, does it not, short bends and swift rapids?

A. She has got pretty good power.

Mr. Wood: That is all.

(Testimony of Melvin Young.)

Redirect Examination

By Mr. Young:

Q. Just one further question. Was there a Mr. Christy who was with you in the engine room at any time? Do you know such a person? [346]

A. No.

Q. There was no one on the boat by that name?

A. Not that I remember.

Mr. Young: That is all.

(Witness excused.)

Mr. Young: Mr. Fowler.

The Court: How many more witnesses do you have?

Mr. Young: I have one short one and this witness. I am sorry. I should like to call Mr. Imlay in place of this witness, who will be very short.

The Court: You are not going to put Kelly on?

Mr. Young: I have three witnesses. I am sorry.

GILBERT IMLAY

produced as a witness in behalf of the Libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Mr. Imlay, do you live in Portland?

(Testimony of Gilbert Imlay.)

A. Yes.

Q. What is your occupation?

A. Deck hand.

Q. Employed by Western Transportation Company?
A. Not at present. I was.

Q. By whom are you now employed? [347]

A. Shaver Transportation.

Q. Well, were you with the Western Transportation Company at the time of the Barry K accident?
A. Yes.

Q. And were you on board the Barry K when the collision occurred with the Pennsylvanian?

A. Yes.

Q. Were you on duty at that time?

A. No; I wasn't.

Q. When did you go off, do you remember?

A. I hadn't been on duty at all. I had just come on the job the previous evening, and I wouldn't have gone on watch until they reached the harbor.

Q. Well, were you in bed at the time just before the collision occurred?
A. Yes.

Q. Where was your room?

A. I was back in the aft bunk room.

Q. The aft bunk room?
A. Yes.

Q. Now, what was the first information you had of anything occurring on the river, there?

A. When John Williams come in and turned the lights on in the bunk room.

Q. That was the John Williams who has been on the stand here? [348]
A. Yes.

(Testimony of Gilbert Imlay.)

Q. And did he give you any information at that time?

A. He come in and says, "Look out. She's going to hit."

Q. What did you do?

A. About that time it hit, and I lit out on the deck.

Q. Had you noticed any whistles that night?

A. No, I hadn't.

Q. I mean whistles either of the Barry K or of any other boat? A. No.

Q. Now, did you get out of bed then?

A. Well, I was practically out then.

Q. Where did you go?

A. I went down on the bow, down in the forward hold.

Q. When you went out on the bow, did you observe the other ship then?

A. I saw it, but I just noticed it. I didn't pay any attention to it.

Q. You did not pay any attention to its precise location, you mean?

A. No, that is just out forward of the boat.

Q. Did you notice the position of the Barry K at that time?

A. Well, it was out in the river. I couldn't say where.

Q. It was what?

A. We were away from our tow—I noticed that—the barges.

(Testimony of Gilbert Imlay.)

Q. How was she headed with reference to, say, the east bank?

A. She was headed toward the east bank. [349]

Q. She what?

A. She was headed towards the east bank at an angle.

Q. Did you notice the direction in which the Pennsylvanian was headed? A. No, I didn't.

Q. Did you notice the barges of the Barry K after the accident?

A. Not until after we were across the river and tied up.

Q. Where were the barges when you noticed them?

A. They were—they were over by the east shore. They were drifting downstream.

Q. Where did they finally come to rest?

A. Well, I noticed that they were drifting downstream and I was down there—I went down in the forward hold with the mate to see how badly the boat was damaged, and when I come back up why the Cruiser had picked them up.

Q. Did you notice any lights on the barges?

A. I noticed two lights.

Q. Two lights? A. Yes.

Q. How far away were the barges when you noticed the two lights?

A. Well, they were across the river from us.

Q. Across the river from you? A. Yes.

Q. What color were those lights?

(Testimony of Gilbert Imlay.)

A. White. [350]

Q. Do you know where they were located on the barges?

A. Know where they should be. I couldn't say definitely where they were, because I hadn't been out on the tow.

Mr. Young: I see. That is all.

Mr. Wood: That is all.

(Witness excused.)

Mr. Wood: In view of the counsel's intimation that Mr. Williams may not be here tomorrow, could I have him recalled to ask him just one question about his testimony before the Inspectors?

Mr. Young: You mean Captain Williams. do you not?

Mr. Wood: Captain Williams. Yes.

E. P. WILLIAMS

a witness in behalf of the Libelant, was thereupon recalled for further cross examination, and, having been previously sworn, further testified as follows:

Further Cross Examination

By Mr. Wood:

Q. Captain Williams, in testifying before the Inspectors, I want to ask you whether you testified

(Testimony of E. P. Williams.)

as follows in answer to questions by Captain Joachims:—

The Court: What page?

Mr. Wood: Page 28. This was on the investigation, not the trial. [351]

Q. The question:

“Q. Do we understand that you keep to the left side of the channel on account of convenience?

“A. Convenience and safety.

“Q. Was the left side of the channel dangerous? A. No, sir.”

Did you so testify? A. Yes, sir.

Mr. Wood: That is all.

Mr. Young: Do you want to ask any questions, Mr. Wood, about the log?

Mr. Wood: Well, he didn't keep it.

Redirect Examination

By Mr. Young:

Q. Will you examine this document, Captain Williams, and state what that is, if you know?

A. It is re-copied, isn't it?

Q. What?

A. It is recopied off the regular log? That is my handwriting, yes.

Q. That is your handwriting?

A. Yes.

Q. Is that the original log?

A. That is my handwriting. That is the one I made up.

(Testimony of E. P. Williams.)

Q. That is what I want to inquire about. Were you the one that made up that log, then?

A. Yes, sir. [352]

Q. And did you write it the night of the accident?

A. Well, our time—we put our time down and place as we go along.

Q. There was some question here as to whether you or Captain Reed had actually written up that log, and I wanted to clarify that at this time.

A. Yes, I wrote that log.

Q. You wrote that log? A. Yes, sir.

Q. Is any of that based upon information given you by Captain Reed?

A. No, I believe not, only as to the time of the collision. I was up at that time and the balance of the time that we arrived at Portland.

Mr. Young: This log is available, your Honor, for counsel's use, if he wishes.

Mr. Wood: I do not care to ask Captain Williams anything about it.

Mr. Young: Very well.

That is all, Captain.

(Witness excused.)

Mr. Young: Now, Mr. Fowler. [353]

LOUIS L. FOWLER,

produced as a witness in behalf of the Libelant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name, please.

A. Louis Fowler.

Q. And you live in Portland? A. I do.

Q. How long have you lived here?

A. Since 1933.

Q. By whom are you employed?

A. Shaver Transportation Company.

Q. How long have you been with that company?

A. Since 1933.

Q. Since 1933? A. 1933.

Q. Were you ever in the employ of the Western Transportation Company? A. I was.

Q. At what time?

A. I believe it was in 1930 or '31, somewhere in there,—I am not sure—I worked a couple of months for them.

Q. Just for a couple of months. Outside of that, have you worked for the Western Transportation at all? A. None whatsoever.

Q. And is your present work with the Shaver Transportation Company [354] permanent so far as you know?

(Testimony of Louis L. Fowler.)

A. As far as I know. I hope.

Q. Do you carry a Federal license?

A. Yes.

Q. What is the nature of the license?

A. I have an operator's license and a mate's license of inland rivers.

Q. And what kinds of boats? What sort of boats driven by what kind of power?

A. Oh, it would class as motor boats.

Q. Diesel engine boats?

A. An operator's license would, yes.

Q. And how long did you say you have held that license? A. Four years.

Mr. Wood: A little louder, please.

A. Four years.

Mr. Young: Q. Were you in the Willamette River at the time that the collision occurred between the Barry K and the Pennsylvanian on February 1 of this year? A. I was.

Q. How did you happen to be there at the time?

A. I was on my way to the dock.

Q. Your way to the dock?

A. I was on my way to the Shaver Transportation Company dock.

Q. You were coming upstream? [355]

A. Coming upstream.

Q. What boat were you on?

A. The tug Cruiser.

Q. Were you piloting the tug Cruiser at that time? A. I was.

(Testimony of Louis L. Fowler.)

Q. Is the tug Cruiser a boat owned by the Shaver Transportation Company? A. It is.

Q. Is it proper to call you "Captain," by the way? A. I don't care.

Q. You do not mind. Well, Captain Fowler, were you familiar with the Barry K owned by the Western Transportation Company? That is, did you know it when you saw it? A. Sure.

Q. Did you see the Barry K at any time earlier that night before the collision occurred?

A. Yes.

Q. Where did you see her?

A. We met each other just about abreast of the Columbia River Paper Mill dock, or it is the port dock of Vancouver Terminal 1.

Q. Now, at the time that you met her, you were then on the tug Cruiser, were you?

A. I was.

Q. And in which direction were you proceeding? A. I was going upstream. [356]

Q. And where was the tug Cruiser when you first saw the Barry K?

A. Between the Interstate Bridge and the Railroad Bridge at Vancouver.

Q. And where was the Barry K?

A. She was above the Interstate Bridge at Vancouver.

Q. What direction was the Barry K travelling?

A. Downstream.

Q. And you were going upstream?

(Testimony of Louis L. Fowler.)

A. I was.

Q. Where were you intending to go at that time?

A. Columbia River Paper Mills at Vancouver.

Q. And where are they located?

A. Just—well, between the bridges, there. They tie the rafts at the lower end of the port dock, right to the dock on the end.

Q. Did you have a raft with you at the time?

A. I did.

Q. What called your attention to the Barry K at that particular time?

A. She whistled two long whistles and a short whistle for the Interstate Bridge at Vancouver.

Q. Do you know about what time of night this was?

A. At the time she whistled, or the time——

Q. The time she whistled was about when?

A. Oh, it was midnight or shortly after.

Q. That would be midnight—that is on the 31st of January, or the 1st of February? [357]

A. That is right.

Q. 1941? A. That is right.

Q. Now, at the time that you saw the Barry K, how far was the tug Cruiser from the Barry K?

A. Oh, I would safely say a mile or better.

Q. How far apart, approximately, is the Railroad Bridge at Vancouver from the Interstate Bridge?

A. Well, I wouldn't say. It is possibly a mile.

(Testimony of Louis L. Fowler.)

Q. Were those the only lights you could see?

A. At that time, yes.

Q. At that time. Now, were you able to identify the Barry K from that distance?

A. Well, if I would just come in sight of her I don't suppose I would have recognized her as the Barry K, but I knew it was, because I knew what she had and where she was going.

Q. Did you know the sound of her whistle?

A. Very much so, yes.

Q. About how far would you say you were from the Barry K when you heard her whistle?

A. Well, I was just coming around the corner of the mouth of the Willamette dike and I would say it was over a mile.

Q. It was over a mile. Now, could you tell where the Barry K was with reference, let us say, to the east side of the river?

A. It was closer to the east side than it was the west side.

Q. And could you tell what the course was of the approaching ship [360] coming downstream?

A. From where I first noticed the ship I would say that she was about exactly on the range as she could get.

Q. You mean by "on the range," Post Office Range?

A. I would say she was right where she should be, right on the range.

Q. After noticing the mast lights of this ap-

(Testimony of Louis L. Fowler.)

proaching ship, did you at a later time see any other lights on that ship?

A. Yes, I saw her green running light come into view.

Q. Now, did you hear any further whistles from the Barry K after you noticed these two whistles?

A. None whatsoever.

Q. Did you hear any whistles from the Pennsylvanian? A. None whatsoever.

Q. Is it possible they may have blown whistles and you not have heard them?

A. Oh, certainly.

Q. Were you concerned in the operation of either of those boats? A. Not at all.

Q. Now, at the distance that you were from the Barry K, could you tell anything about what her speed was?

A. No, I couldn't.

Q. Or the other steamer either?

A. I could not.

Q. At what point of time, if at all, were you able to identify the ship that was coming downstream with regard to what kind of a ship she was? [361]

A. After I came back to pick up Barge No. 24.

Q. That is after the accident, you mean?

A. After the accident.

Q. Now, did you see the collision, itself?

A. Yes.

Q. Just describe to the Court now what you saw.

(Testimony of Louis L. Fowler.)

A. Well, the Pennsylvanian was coming down, like I say. As near as I could tell from where I was at she was on the ship range. All of a sudden she just turned and went right across the river and smashed into the Barry K. That is as near as I can tell what happened.

Q. Could you tell whether the Barry K, itself, or one of its barges was smashed by the Pennsylvanian?

A. No, I couldn't tell, only that the Barry K backed away and run across the river.

Q. Prior to the time that this collision occurred, did you observe any lights on the Bary K?

A. I seen two mast lights going up the river.

Q. And did you see any other lights on the Pennsylvanian after she had turned off Post Office Range and headed to the east side?

A. She turned enough so that the green light went out of sight and the red light came into view and I could see her mast lights from a side view and her red light and that is all.

Q. Did her red light remain continuously in view then until the collision? [362] A. Yes.

Q. What became of the Barry K and the Pennsylvanian after the collision?

A. The Barry K went over across to what they call Silo Dolphin and tied up to repair whatever damage they had, and I went up to the Barry K and asked them if I could be of any assistance. Captain Williams asked me to pick up his barges

(Testimony of Louis L. Fowler.)

and tie them up. So I went back to get them and I picked up Barge No. 24, put on my own port side. The ship then proceeded on down the river——

Q. Pardon me. Where was Barge No. 24 when you picked it up?

A. Drifting around in approximately the middle of the river or a little closer to the west shore.

Q. And what next did you do?

A. Then I turned it around and picked up Barge No. 22. Barge No. 22 was laying right flat against the dike.

Q. Now, the dike on what side of the river?

A. On the west side of the river.

Q. And about where, with reference to this so-called Silo Dolphin that we have heard about? Or do you know where the Silo Dolphin is?

A. Yes, I know where that is at. It was quite a little below that.

Q. It was below that? A. Yes.

Q. But it was on the west side of the river?

A. West side of the river, yes.

Q. Now, at the time that you picked up Barge 24, did you notice [363] what lights she had on her?

A. Had two lights, one on either end on one side.

Q. Which side was that, do you know?

A. Well, when I picked them up why I took it on one side, so the lights would be on my own left side, port side.

Q. And when you picked up Barge 22, what lights did it have on it?

(Testimony of Louis L. Fowler.)

A. It had one light on one forward corner—that is, forward from the *sunk* end, I will say, and on the same side that was sunk.

Q. Did you go out on board these barges at any time? A. No, I didn't.

Q. And you were right alongside them, however? A. Right alongside them.

Q. Were the lights that you saw on those barges plain to be seen? A. Sure.

Q. Were you close enough to the globes on the lights to see whether they were clean or not?

A. Well, I was within the width of the barge of the lights.

Q. What did you observe about the condition of the lights?

A. They looked clean enough to me.

Q. Did you then take the barges upstream?

A. I took them upstream and tied them up at the lower end of Terminal 4.

Q. Did you notice the lights at that time?

A. Then when I left them they had the three lights on them. I looked to see before I left them. [364]

Q. The same three lights they had before?

A. The same three lights.

Q. Had anybody touched those lights at any time while the boats were in your custody?

A. Not to my knowledge.

Q. After leaving the barges at Terminal No. 4, where did you go then?

(Testimony of Louis L. Fowler.)

A. I went to the home dock.

Q. During the time that you have been on the river, what has been your observation as to the side of the river on which the river boats travel in going up and down past Post Office Bar?

A. The east side of the river.

Q. Are there any exceptions to that that you have had occasion to notice at all?

A. No, I don't believe so.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Is it more convenient for them to come up on the left-hand side?

A. Much more convenient.

Q. Why is that?

A. Well, in the first place, the ship is coming down there, I figure,—whether it is right or not I don't know—but I figure that a ship needs plenty of room, and they are headed right down into that
• bight all the time.

Q. Will you let me interrupt you to ask you why the ship needs [365] plenty of room?

A. Well, there is quite a difference in size.

Q. What?

A. The difference in size of the vessels. So if you stay on the east side of the river you are out of way of the ship at all times, or, rather, you should be.

(Testimony of Louis L. Fowler.)

Q. That is the idea, then, that the tug and tow coming up on the left-hand side shall keep entirely out of way of the ship, is it?

A. By following the east shore they should be out of way of ships at all times.

Q. Is the slacker water over there, less current?

A. It depends on the stage of the river. If there is current in the river why it is slacker there, but if it is all slack then it is practically about the same.

Q. Is it shorter for the tugs and tows to come up on that side and reach their destination?

A. Yes.

Q. They have to travel a less distance to reach any place in Portland if they come up on the left-hand side, do they not?

A. Yes, that is right. It is the same as cutting corners.

Q. When you met the Barry K and her barges off Vancouver, as you have described, how close to her did you pass?

A. Well, offhand that would be hard to say. I suppose anywhere from fifty to a hundred feet, probably.

Q. I did not hear. [366]

A. Anywhere from fifty to a hundred feet, something like that. Not much over that, because I was going to land and I was waiting for her to get by.

Q. Which side of her did you pass?

(Testimony of Louis L. Fowler.)

A. Port and port.

Q. You passed port to port, both of you?

A. Port to port.

Q. In other words, you obeyed the narrow channel rule? A. Yes.

Q. And did you consider that fifty or a hundred feet was safe space between you to allow to pass?

A. Yes, there was plenty of room there at that particular point.

Q. There was not any particular reason for you at that time to notice and remember what lights she had on those barges, was there? No accident had happened, there was nothing to fix it in your mind, was there?

A. No, only she had a couple of barges, I noticed, because to see what she had I was going to tie up there and I didn't want to go across her bow.

Q. Well, it is rather, then, that you say she had those lights there because you think that she should have had them rather than you distinctly now remember that she had them there. Is that not a fact?

A. No, sir. [367]

Q. All right.

A. I figure it is my business to see those things for the safety of my own boat and myself and crew.

Q. Did you on approaching her notice her forward range light?

A. She had no range light.

(Testimony of Louis L. Fowler.)

Q. That is what I want to find out. Did she or did she not? A. She had two mast lights.

Q. She had no front range light burning, did she, that you saw?

A. Not that I saw. If it was lit I couldn't see it, anyway.

Q. When you saw the collision, you said you were down near the mouth of the river some place, or where did you say?

A. It was just inside the mouth.

Q. Would you mark the place where you were when you saw the collision? Will you mark her on this chart?

Mr. Wood: Just give me an ordinary pencil.

A. Oh, I suppose I was in here some place.

Q. I will just make a little mark there. Is that the place? You make the mark where you think you were.

A. Looking at the map and looking at the river is two different things for me. I would say I was approximately right along in here.

Q. Here I have marked a cross in pencil and drawn a line up from it and written "Cruiser." Is that the place?

A. That is somewhere near.

Q. And how far were you at that point from the place of the collision?

A. Oh, about a mile, I guess, or maybe a little over a mile. I [368] wouldn't say exactly how far it is. I never did measure it off.

(Testimony of Louis L. Fowler.)

Q. And you saw the Pennsylvanian first up here on the Post Office Range?

A. I saw her two range lights first.

Q. You said she was about where she should be at that time?

A. I would say from the looks of the way she was approaching that—well, I couldn't swear that she was, but I would say she was pretty close to being on her own range, where she should be.

Q. I do not suppose you could swear where she was at any time, could you?

A. I couldn't positively swear to it, no.

Q. And you could not swear to her course, either, could you? You could not swear to her course, either, could you?

A. Her compass course she was traveling?

Q. No, no. The course she came down the river.

A. No, I couldn't swear to her course.

Q. The only thing you had to gauge her course by would be her red and green lights and her mast headlights? A. That is all.

Q. And the ship was perhaps two miles away from you?

A. Approximately, something like that.

Q. You testified you only heard the two blasts from the Barry K, did you not?

A. That is all.

Q. Those are the only whistles you heard from either ship at any time? [369]

A. Those are the only whistles at any time.

Q. And how was the wind?

(Testimony of Louis L. Fowler.)

A. The wind was blowing toward the west shore.

Q. Have you an explanation why you heard only the two blasts and no other whistles?

A. None whatsoever.

Q. After you picked up the two barges at Captain Williams' request and started up the river, was it?

A. Yes, sir.

Q. Where was the Pennsylvanian at that time?

A. She proceeded on downstream.

Q. She had passed you, had she?

A. Yes. She went downstream as I was picking up No. 24.

Q. Was 24 the one you said was lying right alongside the dike?

A. No, 22 was lying aside the dike.

Q. Where was 24?

A. 24 was laying out from the west shore—well, it was far enough out that the Pennsylvanian went down between the west shore and the barge.

Q. She did. That means then that the barge must have been considerably out in the channel, then, was it not?

A. It wasn't too far out. It was out a ways. I wouldn't say just how far.

Q. You do think the Pennsylvanian went down between the barge and the west shore, do you? [370]

A. Do I think it?

Q. Yes. A. I know it.

Mr. Wood: That is all.

Wait just a moment.

That is all.

(Testimony of Louis L. Fowler.)

Redirect Examination

By Mr. Young:

Q. Mr. Fowler, in answer to a question put by counsel, you stated it would be more convenient for logs and tows to go upstream on the left-hand side. What would you say as to whether it would be either safe or practicable for tugs and tows—that is, river boats—to go up the right-hand or west side of that river in the vicinity of Post Office Bar?

A. Well, I guess it could be done, but it depends on whatever is approaching. If another vessel is coming or something, I wouldn't go under there under no circumstances.

Q. Why not?

A. Because I don't think it is any too safe.

Q. And why isn't it too safe?

A. Because you might have enough room and you might not. It depends on what you have in tow.

Mr. Wood: It depends on what?

A. It depends on what you have in tow.

Mr. Young: That is all. [371]

Recross Examination

By Mr. Wood:

Q. Then if it depends on what you have in tow you can hardly say that you would not go that way under any circumstances, can you? You might go there with some kind of a tow and not with another. Isn't that true?

(Testimony of Louis L. Fowler.)

A. Oh, if you had a little small barge or something like that you would go in there if you wanted to.

Q. Have you ever had any experience in navigating an ocean steamer?

A. I have had none.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

JOHN KELLY,

produced as a witness in behalf of the Libellant,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. You live in Portland, Mr. Kelly?

A. Yes, sir.

Q. And what is your occupation?

A. Well, I was a watchman on the Barry K at this time, but I am a deck boy on the Claire, now.

[372]

Q. Is the Claire owned by the Western Transportation Company? A. Yes, sir.

Q. How long have you been in the employ of the Western Transportation Company?

A. Oh, off and on ten years.

Q. Were you on watch on board the Barry K at the time that the collision occurred with the Pennsylvanian? A. I was.

(Testimony of John Kelly.)

Q. When did you go on watch?

A. 6:15 at night.

Q. And when would you ordinarily have gone off watch? A. 6:15 the next morning.

Q. As the Barry K came around into the Willamette River from the Columbia and was headed up towards the place where the collision occurred, where were you on the Barry K?

A. In the pilot house.

Q. Who was there with you?

A. The pilot, Captain Reed.

Q. Captain Reed? A. Yes, sir.

Q. How long did you stay in the pilot house?

A. Oh, I would judge about ten minutes.

Q. And did you leave the pilot house then?

A. Well, he wanted me to go down below to pick—to get ready to pick up a barge at West Oregon mill. [373]

Q. Prior to the time that you had received these orders from Captain Reed, had you noticed any ship coming downstream?

A. I noticed her about a mile upstream.

Q. And do you know what the location of the Barry K was when you noticed her up the stream?

A. She was a little below Post Office Bar light.

Q. That is, the Barry K was?

A. Yes, sir.

Q. And when you saw the Pennsylvanian, at that time you did not know her identity, I suppose?

A. No, I did not know. I knew it was a ship.

(Testimony of John Kelly.)

Q. What lights did you see?

A. I see two white mast lights.

Q. Any other lights? A. No.

Q. Could you tell which direction she was proceeding, what her course was?

A. She was coming downstream. That is all I know.

Q. Do you have anything to do with the navigation of the Barry K?

A. No, sir. I have not.

Q. Do you carry any Federal license at all?

A. No, sir.

Q. Prior to the time that you went below under orders from Captain Reed, had there been any whistle signals given by either of the boats? [374]

A. Well, when I went below the Barry K blew two whistles.

Q. Where were you at the time that the Barry K blew those two whistles?

A. Down on the lower deck.

Q. What were you doing on the lower deck at that time?

A. I went down to see the deck hand, to see that he gets ready to pick up a barge at West Oregon mill.

Q. What deck hand was that?

A. Johnny Williams.

Q. Where was he at the time you saw him?

A. At the fire hold.

Q. Is that h-o-l-e or h-o-l-d?

(Testimony of John Kelly.)

A. Well——

Mr. Young: I have not been able to find out, myself, your Honor. In any event it is in the forward part——

A. It is a bulkhead——

Q. Were those doors in the forward part of the Barry K on the lower deck open at that time?

A. Well, part open.

Q. Part open? A. Yes, sir.

Q. Now, how long did you remain down below?

A. Well, I went right up on the forward deck below the pilot house.

Q. Now, will you examine this photograph, Libellant's Exhibit 3, which shows the forward part of the Barry K, and in the first place [375] show to the Court where you were when the pilot first ordered you to go down below?

A. When he ordered me to go below?

Q. Yes. Where were you then?

A. I was up here.

Q. That is in the top house?

A. Top house, yes.

Q. Is that right? A. Yes, sir.

Q. Now, will you indicate to the Court where you went when you went down below?

A. Well, I went right down the ladders. You see, it is a ladder down here. I guess you can't see it. It is a ladder. Then I went down the back stairway.

Q. Now, in coming into this fire hole, or what-

(Testimony of John Kelly.)

ever it is called—can you see that in this picture, or its location?

A. Well, no, you can't see it. Somebody is standing right across by it, that's all.

Q. The man who is in that picture is standing right by it? A. Yes, sir.

Q. Now, when you came back after having gone down into the fire hole, show the court where you went at that time.

A. Right up here. Forward.

Q. Now, that is on the second deck, is it?

A. Yes, sir. Cabin deck. [376]

Q. Cabin deck. Now, between the time that you heard these two whistles of the Barry K and the time you got up on the cabin deck forward, did you hear any more whistles?

A. I heard the Barry K blow four whistles.

Q. In the meantime had you heard any whistle from the other boat? A. No, I did not.

Q. Now, what further whistles, then, after the four whistles, did you hear?

A. I heard the Barry K blow two more whistles.

Q. And what other whistles?

A. Four more whistles from the Barry K.

Q. Any further whistling from the Barry K?

A. I think the Barry K blowed two more star-board, and then after that the—he stopped his engines, and the Pennsylvanian blowed three whistles and the Barry K answered with three whistles.

Q. And was that the last whistling that was done? A. Yes, sir.

(Testimony of John Kelly.)

Q. Now, did you, except for the three whistles from the Pennsylvanian that you have indicated, hear any other whistles from the Pennsylvanian?

A. No, sir.

Q. Is there any reason you know of why you did not hear any other whistles?

A. Well, I was below, see. I don't know—he didn't blow any, that's all. [377]

Q. Now, at the time that you heard these three whistles from the Pennsylvanian, about how far apart were the boats?

A. Well, I judge about between five hundred and a thousand feet.

Q. And at that time did you receive any orders from Captain Reed?

A. Yes, he blew the whistle for me and I answered it from the lower deck.

Q. What whistle is this you are talking about?

A. The deck whistle.

Q. That is not a whistle for another steamer?

A. No, no. That is a deck whistle; that is to call me.

Q. And did you respond to that?

A. Yes, sir. I hollered up to him. He says get them, that she is going to hit.

Q. At that time how far apart do you think the boats were?

A. Oh, about five hundred feet.

Q. And what did you do?

A. I went down the port side of the deck to call the crew.

(Testimony of John Kelly.)

Q. When you received this order, you were already on the—— A. Cabin deck.

Q. —cabin deck, weren't you?

A. Yes, sir.

Q. And that is where the men were in bed?

A. Yes, sir.

Q. And you went down the port side, you say?

A. Port side. [378]

Q. To call the men. Is that right?

A. Call the crew; yes, sir.

Q. And how far did you get before the collision occurred?

A. Well, I got about halfway down the deck and then the ships hit.

Q. Did you see Captain Williams at any time before the collision?

A. Yes. He come out. Before the collision? No, sir: I didn't.

Q. And where was he when he came out?

A. Coming out his door in the port side.

Q. Was that after the collision?

A. Yes, sir.

Q. Did you see the collision, itself?

A. Well, she hit on the port—coming down, she hit on the starboard side of No. 22, the lower door, after door.

Q. Do you know whether the Barry K was in motion or standing still at the time of the collision?

A. She was backing up.

Q. Backing up. And could you tell how far the Pennsylvanian was proceeding?

(Testimony of John Kelly.)

A. No, I could not tell.

Q. Did you notice what became of the barges after the collision?

A. Well, they went drifting down the river.

Q. Where did they finally come to a stop?

A. Well, I couldn't tell that.

Q. Now, as watchman, did you have anything to do with the matter of putting lights on the barges? [379]

A. Oh, yes. That is my duty.

Q. And did you put the lights on the barges that night? A. Yes, sir.

Q. Do you remember where the boat was at the time that you put the lights on the barges?

A. At Camas, Washington.

Q. And about what time of night was it?

A. Oh, about half past ten at night.

Q. Prior to that time the boat had been tied up there for a while, had it?

A. No, she has to bring empty barges up there and make the switch and pick up the loaded ones.

Q. In any event, preparatory to coming back to Portland it was about 10:30 that you lighted the barges? A. Yes.

Q. Tell the Court what you did about the lights on the barges. A. I put a barge——

Q. You put a barge where?

A. I put a light on the starboard outside corner of 22.

Q. Go right ahead.

(Testimony of John Kelly.)

A. And I put a light on the port outside corner of 24, on the forward end, and I put a light on the after corner of 24.

Q. And how did you fasten these lights onto the corners of the barges?

A. Well, there is a nail up there. [380]

Q. How high above the deck?

A. Oh, about six feet.

Q. And where were those nails with reference to the exact angle of the corner?

A. On the starboard outside corner.

Q. When you attached—first of all, did you have the lights with you when you went out to the barges?

A. Oh, yes. I had to carry them out to put them on.

Q. They are not kept there at times except when they are in use?

A. Oh, no. I have to refill them and clean the globes.

Q. Did you refill them and clean them that night?

A. Oh, yes.

Q. You cleaned the globes, too?

A. If they aren't clean I have some other lights to replace them with.

(The last answer was read by the reporter.)

Q. Now, this light, Libelant's Exhibit 8, is it the type of light that you had at that time?

A. Yes, sir.

Q. Will you indicate to the Court the condi-

(Testimony of John Kelly.)

tion of the globe of this light compared with the condition of the globes of the lights——

A. Just about the same.

Q. Just about the same? A. Yes. [381]

Q. When you attached these lights to the nails, did any portion of the light, itself, extend out beyond the angle so that it could be seen from the side on the forward end? A. No, it didn't.

Q. It did not. Now, did you, after placing these lights in a position that you have indicated, have occasion to go out on those barges any more before the accident happened?

A. Oh, yes. You are supposed to go out and see if they are lit.

Q. Did you do what you were supposed to do?

A. Oh, yes, sir. That is my duty.

Q. And how frequently did you go out on these barges between the time that you first lighted those lights and the time that the accident happened?

A. Oh, about an hour. Oh, about every half hour I went out.

Q. About every half hour? A. Yes.

Q. And on the times when you went out around these barges, you actually saw the lights, did you?

A. Yes.

Q. And were they all lighted?

A. Yes, every one.

Q. And were they lighted at the time you were up on the forward deck there, just before the accident?

(Testimony of John Kelly.)

A. I can't see them from the forward deck.

Q. How long had it been before you went down below under the [382] Captain's order that you had last inspected these lights?

A. After I left Vancouver.

Q. So that between the time the Barry K left Vancouver and got down to the point of collision you had actually inspected the lights?

A. Yes, sir.

Q. What was the condition of the weather that night?

A. Oh, it was kind of a breeze, a wind. That is all I know.

Q. Which direction?

A. Oh, I guess it was kind of towards the west shore.

Q. After the accident occurred, did you at any time later see the lights on the Barry K, the Barry K's barges?

A. Oh, yes. When they were downstream drifting.

Q. And how far away from you were those barges at the time you saw them drifting?

A. Well, I couldn't tell how far they were.

Q. Some considerable distance?

A. I would judge a mile.

Q. Did you again see those lights up at Terminal No. 4? A. Yes, sir.

Q. And what was the condition of the lights then? A. They were on the barges, lit.

(Testimony of John Kelly.)

Q. And were they all in the same condition that they had been before the accident?

A. Yes, sir. [383]

Q. At the time that you went to summon the members of the crew, did you go to summon Captain Williams also?

A. I went down on the deck, there, to wake up the crew, down the port side of the deck to wake up the crew. There was quite a few people in bed.

Q. Well, did you go in to wake up Captain Williams in addition to the rest of the crew?

A. Yes, but he came out in the meantime while I was going down, and the mate come out, and the cook came out, and the chief engineers came out.

Q. In other words, he came out before you had the opportunity to notify him? A. Yes.

Q. There has been mention made in this case of a forward range light on the Barry K. Do you know where that light is?

A. You mean the stem light?

Q. Stem light. A. Yes, sir.

Q. Was that light lighted this particular night?

A. No, sir.

Q. Why not?

A. Because I have to put them out, because the flare of that light from the barges will blind a man in the pilot house.

Q. And when you had a barge such as No. 22 on the nose of the Barry K could anyone from forward see that light even if it were lighted? [384]

(Testimony of John Kelly.)

A. No, sir.

Q. Were the other lights on the Barry K lighted, the mast lights and range lights,—running lights, I mean? A. Yes, sir.

Q. Did you have anything to do with the lighting of those lights?

A. No. They are done by electricity. If they are out I have to report them and then replace them with globes.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Mr. Kelly, what duties are yours besides looking after these lights?

A. Well, my duties is to be closely to the pilot house at all times.

Q. Do you consider that you are acting as lookout?

A. Well, I am lookout. When I ain't down below looking around I have to go down below, and there might be somebody smoking in bed, and they might start a fire. There might be a leakage or something.

Q. I infer from your answer you are sort of a general handy man to do whatever the pilot house asks you to do. Is that correct? A. Yes, sir.

Q. Now, you said that at the time of the collision the Barry K was backing up. I did not know whether you meant merely that her engines were backing or that she was making sternway through the water.

(Testimony of John Kelly.)

A. Well, her engines was backing up at the time of the collision. [385]

Q. Is that what you meant? A. Yes.

Q. She still had headway on her, did she not?

A. Well, they have got a reverse bell there to back up.

Q. I know, but I say she was still going ahead through the water, or could you tell?

A. I couldn't tell.

Q. You said that before you started out from Camas on this journey at 10:30 P. M., you were busy handling some empty barges, did you?

A. That is when we bring them in to the mill, the mill in the slough. We bring empties in there and then pick up the loaded ones to bring them out.

Q. So that this tow that became involved in the collision was a separate thing and was made up and started out at 10:30 P. M.?

A. Yes, from Camas, Washington.

Mr. Wood: Let me see the log book, will you, please?

This does not cover the period in question.

Mr. Young: Pardon me. It starts at midnight. That is the point. I did not understand there would be any question about the use of the log prior to that time. But I will produce the other sheet to go back of that.

Mr. Wood: You have not got it now?

Mr. Young: No, I have not. I am sorry.

(Testimony of John Kelly.)

Mr. Wood: Q. Then do I understand, Mr. Kelly, that at 10:30 you placed these lights on the barges and lit them and—— [386]

A. No. I lit them, yes, but I came outside of the slough there to pick up Barge 22.

Q. When did you light these lights? That is what I want to know.

A. I lit them when you go in the slough, there, to pick up the barges.

Q. What time is that?

A. Oh, it is between 9:30 and 10 o'clock.

Q. 9:30 and 10 o'clock? A. Yes.

Q. In other words, these lanterns that we are talking about were burning from 9:30 or 10 o'clock on to the time of the collision, were they?

A. Yes, sir.

Mr. Young: If the Court please, I should like to give to counsel at this time the engine room log which does cover the period counsel is inquiring about, and I think has data from that source as to the questions he is inquiring about.

Mr. Wood: Thank you.

Q. I cannot make anything out of this unless the home dock means Camas. Does it?

A. Home dock?

Mr. Wood: I will have to wait for the other log, I guess.

Q. Do you have the duty of trimming the wicks of these lanterns? A. I do.

Q. And filling them and all? [387]

(Testimony of John Kelly.)

A. Yes, sir.

Q. Did you get this lantern here at the request of counsel and bring it to court?

A. No, I did not.

Q. Did you burn ordinary kerosene in those lanterns? A. Yes, sir.

Q. How often do you trim the wicks?

A. Every time I take them in and clean them before I light them.

Q. And did you make a round of these lights going outside around the houses of the barges?

A. I do.

Q. Every half hour? A. Yes, sir.

Q. You did that this night? A. Yes, sir.

Q. Found them burning? A. Yes, sir.

Mr. Wood: That is all.

(Witness excused.)

Mr. Young: That is all.

Mr. Wood: I am going to request the Court's permission to light that lantern with ordinary kerosene and let it burn.

The Court: When it gets cooler.

Mr. Wood: For this period. [388]

Mr. Young: If the Court please, there was some question here about reading the log book. I should like to recall the engineer for just a moment because it is his handwriting.

Will you take the stand a minute, please?

MELVIN YOUNG,

a witness in behalf of the Libelant, was thereupon recalled, and, having been previously sworn, further testified as follows:

Further Direct Examination

By Mr. Young:

Q. I am going to hand you the log, the engine room log, and ask you to read off for counsel what these notations are here on the left page.

A. That is—starting back at Camas, — from Camas?

Q. Yes.

A. Well, when we left Camas we had 12 and 23, or left 12 and 23 and got 24.

The Court: That is the last entry on the bottom of page 46? A. Yes.

Mr. Young: Q. Does that give you the time when you left Camas? A. Yes.

Q. When?

A. We arrived there at 9:10 and left at 10:30.

Q. You arrived at Camas at 9:10 and left at 10:30? A. Yes, sir. [389]

Q. On the top of page 47 of the Engineer's Log, what appears there?

A. Mott's Slough. We got 22 and arrived there at 10:45 and left about 10:50.

Q. Is that 11 over there?

The Court: Picked up Barge 22 at 10:45.

Mr. Young: Q. And left at 11. Now, where is this slough that you are talking about?

(Testimony of Melvin Young.)

A. That is the mouth of the Camas Slough.

Q. The mouth of the Camas Slough.

Mr. Wood: As I understand, the other witness said he lit the lanterns at the time that they were at the slough, which was somewhat earlier than leaving Camas.

The Court: They picked up the barges at two different places, two different times.

Mr. Young: That is all, Mr. Young.

(Witness excused.)

Mr. Young: If the Court please, it being now ten minutes of twelve, I should like to make this suggestion: that we have the opportunity to wait until tomorrow morning to rest. I think that we have completed our case, but there may be some tag ends that I would like to go into and it would take just a few minutes in any event.

The Court: If they have completed it, Mr. Wood, keeping in [390] mind on my part you have witnesses here from out of the city, would you like to attempt to finish in two days your part of the testimony?

Mr. Wood: Well, I should like to, if it can be done without hurrying. But I attach too much importance to the case to try to hurry over any phase of it.

The Court: Then it is very doubtful.

Mr. Wood: It is doubtful.

The Court: We will not plan to hold court on Saturday, then.

(Thereupon, at 11:50 o'clock A. M., Court was adjourned until tomorrow, Friday, July 18, 1941, 8 o'clock A. M.) [391]

Friday July 18, 1941, at 8 o'clock A. M., pursuant to adjournment, the following further proceedings were had:

Mr. Young: Libelant rests, your Honor.

Mr. Wood: We will call Captain Norberg of the Pennsylvanian.

United States
Circuit Court of Appeals
For the Ninth Circuit. ✓

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellant,

vs.

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellee,

And

WESTERN TRANSPORTATION CO., a corporation, owner of the
Steamboat "BARRY K", etc., and Barges 22 and 24,
Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a corporation,
owner of THE SS "PENNSYLVANIAN", her engines, boilers, etc.,
Appellee.

Apostles on Appeal
In Two Volumes
VOLUME II
Pages 463 to 904

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

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Upon Appeal from the District Court of the United States
for the District of Oregon

JOHN NORBERG,

produced as a witness in behalf of the Respondents,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Norberg, you were the pilot of the
Pennsylvanian on the night of this collision, weren't
you? A. Yes, sir.

Q. Where do you live, Captain?

A. Oak Grove, Oregon.

Q. You are a local resident here? A. Yes.

Q. What pilot licenses do you hold?

A. I have got a pilot license for San Francisco,
San Pedro, San Diego, Humboldt Bay, Coos Bay,
Columbia Bar at Astoria, Willapa Harbor, Grays
Harbor, Puget Sound and adjacent territory, be-
tween Astoria and Vancouver, Washington, and
Portland, Oregon.

Q. And what department are those licenses is-
sued by? A. The Steamboat Inspectors.

Q. Of the United States Government? [392]

A. Yes, sir, federal license.

Q. Federal license. What has been your experi-
ence at sea, in the rivers; how long have you been
in this business?

A. I have been piloting in the rivers about six
years.

Q. In the Columbia and Willamette Rivers?

A. Yes.

Q. And before that what has been the nature of
your sea experience?

(Testimony of John Norberg.)

A. Thirty-seven years as Master.

Q. Of what kind of vessels?

A. Oh, ocean-going vessels.

Q. Ocean-going vessels. Are you a member of this so-called Columbia River Pilots' Association?

A. No.

Q. You are known as an independent pilot, are you?

A. Yes.

Q. That means not a member of their association?

A. Yes.

Q. And is your employment that of piloting ships generally of all companies or are you employed by one company?

A. One company.

Q. What company is that?

A. American-Hawaiian.

Q. You are employed to pilot their vessels exclusively, are you?

A. Yes, sir.

Q. How long have you been employed by them to do that work? [393]

A. Pretty near thirteen years.

Q. Have you been doing that work for them here on the river for the last five or six years?

A. No, about three years and four months.

Q. Are you still doing that work for them?

A. Yes.

Q. You are in their employ now?

A. Yes.

Q. You were the pilot of the Pennsylvanian in navigating her or handling her as pilot on the night of this collision, were you?

A. What?

(Testimony of John Norberg.)

Q. You were the pilot of the Pennsylvanian on the night of the collision? A. Yes, sir.

Q. Where were you on the ship?

A. On the bridge.

Q. And what officers of the ship were on the bridge with you?

A. The Captain of the ship, Captain Vaux, the third officer Nelson.

Q. Third Officer Nelson? A. Yes.

Q. And who was directing the course of the ship? A. I was.

Q. What was Captain Vaux doing?

A. Captain Vaux, he was assisting me and keeping a lookout.

Q. And what was Third Officer Nelson doing?

A. He was also keeping a lookout and tending to the telegraph. [394]

The Court: Will you identify those to me now?

Mr. Wood: Yes, your Honor. Captain Vaux, will you stand up? He is the Master of the ship; and Third Officer Nelson. Those are the two that flew up from San Francisco.

Q. Now, Captain, I don't mean the precise minute when I ask you these times, but about when did you leave Portland to go down the river?

A. I left Portland, I think, three minutes past twelve, midnight.

Q. And where were you bound for?

A. Astoria.

Q. And how was the ship loaded; what was her draft?

(Testimony of John Norberg.)

A. She was partly loaded, drew 19 feet and 2 inches, I believe, deepest draft.

Q. That was astern, was it, aft? A. Yes.

Q. Do you know what her draft was forward?

A. 15 feet, I believe.

The Court: What did she draw fully loaded?

Mr. Wood: I think I better ask Captain Vaux that. Would you like to know that now, your Honor? Captain Vaux, will you please stand up and be sworn.

(Whereupon Earle B. Vaux was sworn.)

Mr. Wood: Captain Vaux, what would the Pennsylvanian draw fully loaded?

Mr. Vaux: According to the season, that is, the summer draft [395] was 29.07 deep; that is a mean. Her mean draft would be 29.07. Tropical would be 30 feet and 1 inch, and she would have a winter draft of 29 feet. It is a seasonal draft.

Mr. Wood: I understand the law and the regulations prescribe different freeboards in summer and winter. Thank you, Captain.

Q. You can now describe, please, for the Court, the course of the vessel as you left Portland and proceeded down the river, passed under the bridges and so on, tell what happened.

A. We started down river, slow speed, half speed——

A. A little louder, please; speak to the Court but speak loud.

A. Yes. We went through the St. Johns Bridge, proceeded down towards Post Office range under

(Testimony of John Norberg.)

slow speed and half speed, just according to how fast and how slow we was going. Down at Post Office range and just coming up the range there was a boat coming up-river——

Mr. Young: If the Court please, I really can't hear the witness.

Mr. Wood: Step up closer.

The Witness: I will talk a little louder.

Mr. Young: Please.

The Witness: Yes.

A. (Continuing) Saw a tug coming up the river as we were coming off the range.

Q. As you were coming off the range?

A. Yes. We was favoring the east side of the channel. [396]

Q. I didn't hear that last.

A. We was favoring the east side of the channel.

Q. You were favoring the east side?

A. Yes. Or the right side. Then we got one blast of the whistle from the tug, which was answered by the Pennsylvanian, one blast. The tug was then showing a red light.

The Court: Q. Who answered it, you?

A. Beg pardon?

Mr. Wood: Q. Who blew the whistle on the Pennsylvanian? A. I did.

Q. The tug at that time was showing her red light?

A. Showing the red light. And slowed down,

(Testimony of John Norberg.)

half speed; then we got the danger signal from the tug, a group of short blasts and couldn't tell how many it was, they was coming too fast, too close together. Then we stopped and we got another group of signals and I ordered full astern. By that time the tug had passed our bow and came up on the other side and turned his green light to us, against our red.

Q. Now, the red light was on which side of the vessel?

A. The red light is on the port side.

Q. Then green light is on the starboard?

A. Yes. We was then going full astern, or at least the Pennsylvanian was going full astern and there was another group of whistles—I should mention that when I ordered the engines full astern I gave three blasts of the whistle. [397]

Q. The law requires that, doesn't it? What does that indicate? A. Full astern.

Q. Three blasts of the whistle is the law, the legal signal. "My engines are going full speed astern," is it not?

A. Yes, when the vessel is under way.

Q. All right. Go ahead.

A. Yes. Then the last group of signals we got we was getting pretty close together and the Pennsylvanian was swinging away towards the bank and the other one came almost at a right angle in front of the Pennsylvanian's bow. The tug was well off on the side. Then I noticed that the tug

(Testimony of John Norberg.)

had two barges—or one barge I could see, the reflection of our mast headlight shown down on the barge, could see just the first indication that I had that that tug was pushing a barge.

Q. Ahead of her?

A. Ahead of her. About that time we was very close together and the collision took place. I should judge about thirty feet or so in on the barge from the stem of the Barry “K”.

Q. You hit the starboard side of the barge?

A. Hit the starboard side of the barge.

Q. About 30 feet ahead of the stem of the Barry “K”?

A. Yes.

Q. Captain, I think I will ask you to mark on the chart some locations.

Mr. Young: If the Court please, may I suggest that if there [398] is available a blue pencil, that any marks put on there by this witness should be in blue?

Mr. Wood: We will use a blue——

Mr. Young: Very well.

Mr. Wood: Q. On Libelant’s Exhibit 2, the chart of the river, will you first point to the location of the Pennsylvanian as near as you can when you first sighted the Barry “K”?

A. It was pretty close to here somewheres.

Q. All right. Coming off the range there, you say?

A. Coming off the range.

Q. About where I am marking?

A. Just about.

(Testimony of John Norberg.)

Q. I mark that with a blue cross. I have marked that with a cross and a line drawn from it and indicated, "Pennsylvanian, Norberg, first saw Barry 'K'." Now, about how far down the river was the Barry "K" from you at that time?

A. Less than a mile, I should judge.

Q. Will you indicate about where you think she was at that time?

A. Just about off here somewheres, close to that other mark, pretty close.

Q. Well, I put a blue cross right beside the red cross that Captain Reed used to indicate the Barry "K" when he first saw you. Now, can you please indicate on there where the collision took place as nearly as you can tell?

A. Well, that is pretty close to the other mark here, too, as [399] near as I can judge; it might be maybe a hundred feet, just about there.

Q. You just don't differ much then from Captain Reed as to where the collision took place?

A. No.

Q. That is where you said, where I made the mark? A. Yes, just about.

Q. Where I put the blue cross alongside the red cross that Captain Reed used?

A. Yes. Pretty close.

Q. Will you take the stand again, please? Now, in my questions to you just now I referred to when you first saw the Barry "K". Well, what did you see, actually what did you see, to indi-

(Testimony of John Norberg.)

cate there was a tug and tow down the river ahead of you when you first saw her?

A. She had two mast lights and a red side light and brilliant deckhouse lights along the sides.

Q. Well, the deck lights—I mean those house lights are no part of her navigation lights, are they? A. Oh, no.

Q. And the red light indicated to you that her position was what, towards you, at that time?

A. She was coming up the stream across my bow.

Q. Showing her left side to you?

A. Yes. [400]

Q. And what do the two vertical lights mean that you saw? A. A tow boat light.

Q. That she had a tow?

A. Yes, she had a tow.

Q. But you did not at that time see any lights on the barges? A. No, sir.

Q. Did you at any time see any lights on the barges?

A. After the collision we had a search light on the barges, on one of them, swung around, and Captain Vaux drewed my attention to it, a little lantern that sat on the corner of a barge and evidently that was the end of the barge that was next to the stem of the Barry "K"?

Q. In other words, you saw a little lantern on the rear starboard corner of the barge; is that right?

(Testimony of John Norberg.)

A. I think it was on the port, yes.

Q. What was it, a kerosene lantern?

A. Just a small, what they call a construction lantern; you know, that they use for finding the way in boarding ship or——

Q. Like this? A. No, sir.

Q. How did it differ from this?

A. Oh, it was a higher lantern that you pull up the slide, you know, and take the globe out.

Q. Oh, that kind?

A. Yes, like they use for construction work. Well, they put them [401] on piles of sand and anything like that, you know.

Q. And how brightly was it burning?

A. Well, we had to use a search light to find it.

The Court: He means on piles to warn that there is construction there. I thought he said a minute ago that they used on board ship.

Mr. Wood: Q. What did you mean, Captain, when you used the phrase that they use them on construction?

A. Well, I have seen those lights, you know, when they pile up a sand pile or wood pile or anything like that, they put them on there as a warning.

Q. An ordinary kerosene lantern, is that what you mean? A. Yes.

Mr. Young: If the Court please, the record shows, I presume, that the lantern which counsel is exhibiting to the witness is the one that has

(Testimony of John Norberg.)

already been identified and in evidence as Libelant's Exhibit 8?

Mr. Wood: That is right.

Q. Now, Captain Norberg, I forgot to ask you to describe the conditions of the night. Will you do that? What kind of a night was it?

A. It was dark——

The Court: Q. What is your age, Captain?

A. Beg pardon?

Q. What is your age? [402]

Mr. Wood: Q. Age; how old are you?

A. Sixty-five.

Q. Where were you born? A. Sweden.

Q. Now, what kind of a night was it, Captain?

A. It was calm, dark, and quite dark, and there was no wind; it was just the light air, small outgoing current.

Q. Smooth outgoing current?

A. Small; half a knot or so.

Q. Half a knot or so?

A. Yes. Between half a knot to a knot, I should judge.

Mr. Young: Could you speak just a little louder, Captain, please?

Mr. Wood: Q. How was the visibility?

A. The visibility was good.

Q. Was it clear overhead or overcast?

A. Overcast.

Q. And you say it was calm, no wind?

(Testimony of John Norberg.)

A. No wind.

Q. How was the water?

A. The water was smooth.

Q. Was there any condition present which made it difficult to navigate that channel?

A. No, sir.

Q. When you received this one blast from the Barry "K", was that [403] soon after you first saw each other? A. Shortly after.

Q. Could you give us an idea about how far apart the ships were then?

A. I should judge about three-quarters of a mile.

Q. Was she still showing you her red light?

A. Yes, sir.

Q. How did she appear off your bow, dead ahead or starboard or port?

A. She was coming across my bow when she blowed that first signal; she was about dead ahead and then she was coming farther up the channel and naturally she got on my port side then.

Q. Yes. And when you received the first blast from the Barry "K", did you confirm it in any way by conversation with your other navigating officers?

A. There is always a rule to ask men that is on a bridge what signal that was.

Q. Is that a regular standing rule?

A. That is the customary rule on an American-Hawaiian ship.

(Testimony of John Norberg.)

Q. What did you do; did you follow that rule?

A. Yes, sir.

Q. What did you do?

A. I asked the Captain, I says, "Was that one blast?" The Captain said, "Yes." I also asked the Third Officer, "Did you hear that there was one blast?" "Yes," he said. [404]

Q. Did you ask them those questions because you had any doubt in your own mind as to what you heard? A. No.

Q. You were following the routine practice?

A. Yes, sir.

Q. And after they had confirmed the whistle to you in that manner, is that when you answered? When did you answer that one blast?

A. Oh, about half a minute, less than that; ten seconds after I heard the blast, after we had conferred.

Q. After you had conferred? A. Yes.

Q. Now, when you answered that one blast, did you get an immediate response from the Barry "K"? A. No, not right away.

Q. But sometime later you got what?

A. I got a group of blasts.

Q. And what did you do then?

A. I slowed down.

Q. And then what?

A. And held my course along the land there and stopped.

Q. What do you mean by along the land?

(Testimony of John Norberg.)

A. For the right side of the channel.

Q. Now, you say that sometime between the time you have been talking about and the collision the Barry "K" swung around and [405] showed her green light?

A. Yes, sir.

Q. What did that indicate to you?

A. That she was coming around over towards me again.

Q. How far away was she then, do you think?

A. Oh, I should judge about twelve or fifteen hundred feet, approximately.

Q. Was that sufficient space for her to resume her course and pass to port if she wanted to?

A. Yes, sir.

Q. What was the supposition in your mind when you saw that green light twelve hundred feet away?

A. She might have got out of control and taken a sheer.

Q. Took a sheer? A. Yes.

Q. What does a sheer mean?

A. Swing off the regular course either way.

Q. Vessels do that sometimes, do they?

A. Oh, yes.

The Court: That is when he saw the green light?

Mr. Wood: Yes.

Q. What did you expect her to do?

A. Swing back again onto her course.

Q. And pass you port to port?

A. Yes, sir. [406]

Q. How close were you to her when you were

(Testimony of John Norberg.)

forced to the conclusion she was not going to swing back on her course but that there was some danger of collision?

A. About 800 feet or more perhaps.

Q. Then what did you do?

A. Full astern.

Q. What did you do with your rudder?

A. Hard right.

Q. Now, when you back full speed astern an ocean-going steamer of the type of the Pennsylvanian, what effect does that reversing motion of her propeller have on the swinging of the ship?

A. Swing to the right.

Q. Which end of the ship swings to the right?

A. The bow.

Q. And the stern swings to the left?

A. Yes, sir.

Q. It is often referred to as backing to port, isn't it?

A. That is right.

Q. And that means that the stern backs to port?

A. Yes, sir.

Q. Do you know whether that took place with the Pennsylvanian; in other words, was your backing long enough in time to have that effect on the Pennsylvanian, or not?

A. Oh, yes.

The Court: Have him explain the hard right rudder. [407]

Mr. Wood: Q. Will you explain what a hard right rudder is?

A. Swing to the right; that is right rudder, and to the left is left rudder.

(Testimony of John Norberg.)

Q. In which direction will a hard right rudder send your ship in?

A. Turn to the right.

The Court: Q. On the backing maneuver, just tell why you gave the hard right rudder order.

A. To get away from the vessel that is coming on your port side, to get away from the vessel that is closing in on you.

Q. In other words, it added to the natural result of your backing, threw your bow to the right more?

A. Yes. All single-screw, right-handed ships handle that way.

Mr. Wood: Q. You mean a screw that turns——

A. Propeller.

Q. The propeller that turns clockwise?

A. Yes.

Q. That is what you call a right-handed screw, is it?

A. Yes.

Q. Captain, I suppose you have passed steamers in that channel many times, have you?

A. Yes, hundreds of times.

Q. Big ocean steamers?

A. Yes.

Q. How do they pass? [408]

A. Port to port.

Q. Do you know the approximate width of that channel?

A. 800 feet.

Q. Of deep water?

A. Of good deep water.

Q. What would you say as to that channel being

(Testimony of John Norberg.)

wide enough for craft to pass safely port to port; is there enough room there?

A. Yes, plenty of room; plenty.

Q. Is there any reason why it is not safe or practicable for tow boats there to pass port to port?

A. I can't see no reason why they couldn't.

Q. Do you know about how high the bow of the Pennsylvanian was out of the water, how much freeboard she had forward, or do you know?

A. No, I couldn't—I don't go into that enough. I pilot the ship.

Q. What happened after the collision; what did you do then?

A. Well, we stayed around and inquired of the Barry "K" if they needed any assistance. She went over across to the other side and made fast, I believe, to Silo Dolphin there, some pilings along the dike there on the west side, and we was figuring out to send for some tugs, you know, to take care of the barges. She was going to stay there until we got a tug and was going to send in a wire to American-Hawaiian. About fifteen minutes or so later a tug came along—— [409]

Q. You mean the tug Cruiser?

A. Cruiser. And went over to the Barry "K". We asked him to go over there and he went over to the Barry "K" and he came back and we asked him if the Barry "K" was heavily injured and he said, "No,"—if anybody was hurt on board the Barry "K"; "No." We asked him if he would

(Testimony of John Norberg.)

take care of the tug, at least take care of the barges. He says, "Yes," he could handle them. We says, "If you can't, we will try to help you." He says, "No, I can handle them."

Q. Were the helm orders that you gave on the bridge of the Pennsylvanian properly carried out in all respects to your satisfaction? A. Yes.

Q. There was no question of helm orders being wrong or not carried out? A. No.

Q. Did you have a lookout? A. Yes.

Q. Where was he stationed?

A. In the eyes of the ship.

Q. In the eyes of the ship?

That phrase means up in the forecastle head, doesn't it? A. Right forward.

Q. Forward? A. Yes. [410]

Q. Were your engine orders carried out?

A. Yes, sir.

Q. The system on vessels is for what you call the telegraph to signal your engine signal to the engine room and then they repeat it back on the same instrument, do they not? A. Yes, sir.

Q. Which tells you that your order has been heard?

A. Yes, sir. Besides that we got the indicator that shows when the engines back and go ahead, red and white lights.

Q. Do you know then that your engine orders were properly carried out? A. Yes.

Mr. Wood: Have you the log there, Captain?

(Testimony of John Norberg.)

Mr. Vaux: Yes, I have. Which one do you wish?

Mr. Wood: The bridge log.

Q. Captain, after you came down through the St. Johns Bridge, I don't know whether you remember without referring to the bell books just exactly what your speeds were, do you?

A. Sometimes slow and sometimes half. Went by any vessel, slow down; if a vessel was laying along the docks, slow down going past Terminal 4.

Q. Well, after you passed through the St. Johns Bridge, can you tell us what your speed was or should we refer to the books on that?

A. You mean the engine room's bells or speed of the vessel? [411]

Q. Yes. I don't know whether you remember just what your speed was or not.

A. No. You get so many ships that way that I couldn't remember.

Q. What is your best recollection of what speed you were making as you approached the Barry "K"?

A. About seven, eight knots. Perhaps less.

Q. What is your custom, by the way, and your practice if you are passing close enough to a tow to endanger her lines at all, what do you do?

A. Slow down.

Q. Is that regular?

A. That is the unwritten law.

Q. Do you observe it? A. Yes, sir.

Q. Have you any idea what your speed was at the moment of impact?

(Testimony of John Norberg.)

A. Oh, about one or two knots, perhaps.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. I believe, Captain, you testified that you have had somewhere around six years of experience in the Willamette and Columbia rivers?

A. Yes.

Q. And prior to that time your experience has been confined to [412] places other than this territory; is that right? A. Yes.

Q. Most of it, however, had been on the high seas, had it not? A. No.

Q. Not? A. No.

Q. How much of it had been on the high seas?

A. Oh, about eight or ten years—ten years.

Q. And was that the eight or ten years before you came to the Columbia River? A. Yes.

Q. There is quite a bit of difference between the operation or piloting of vessels on the high seas and piloting them in the river channels, is there not?

A. No.

Q. No difference?

A. We use the same rules.

Q. However, your passages are much closer in the rivers, are they not, than on the high seas?

A. Well, they got more room on the high seas.

Q. That is what I mean. The great wide open spaces are out there that don't exist on the rivers; isn't that true?

(Testimony of John Norberg.)

A. We use the same rules, the same law.

Q. The same law, but, nevertheless, there is a lot more room to maneuver, isn't there? [413]

A. Yes.

Q. Now, Captain, when you came into the work in the Columbia and Willamette rivers, did you at any time have any experience in the operation of river boats? A. No.

Q. Your experience in the Willamette and Columbia rivers has been confined to the operation and piloting of ocean-going vessels; is that right?

A. Yes.

Q. And for the last three or four years you have worked only for the American-Hawaiian?

A. Yes.

Q. Did you work for any other company in the Willamette or Columbia rivers prior to the time that you came over to the American-Hawaiian?

A. Luckenbach.

Q. And did you work exclusively for them at that time? A. Yes, sir.

Q. Any other company? A. No.

Q. Then you have worked for only two companies which operate vessels in the Willamette and Columbia rivers? A. Yes.

Q. And those were all ocean-going vessels?

A. Yes. [414]

Q. You were not in this territory, I take it, at the time that American-Hawaiian had a collision down the Columbia River at Altoona between the Welsh Prince and the Iowan, were you?

(Testimony of John Norberg.)

A. I had just came up the Columbia River a couple of months—a month before that.

Q. A month before that?

A. In one of the Luckenbach ships.

Q. How soon after that accident did you go to work for the American-Hawaiian?

A. About six years.

Q. Six years later? A. Yes.

Q. Did you know that the American-Hawaiian stopped operating its ocean-going vessels in the Willamette and Columbia rivers in the nighttime following that accident, for many years?

A. Sure; I worked for them when we was doing that.

Q. You knew that to be the fact?

A. Yes.

Q. How recently is it that the American-Hawaiian has resumed the operation of its ocean-going vessels in the Willamette and Columbia rivers at nighttime?

A. Well, it is about—less than two years, I think.

Q. Less than two years?

A. Isn't that so? Yes, less than two years.

Q. You mean two years dating back from now or the accident? [415] A. From now.

Q. Dating back from now?

A. From now.

Q. Yes. Then prior to that two-year period and subsequent to the time of the Welsh Prince accident, the American-Hawaiian was not operating

(Testimony of John Norberg.)

its vessels in the rivers in the nighttime; am I correct about that? A. Yes, you are correct.

Q. How much of the time have you had experience in piloting vessels in the Willamette and Columbia rivers at night?

A. Oh, about five years.

Q. How frequently during, say, the past five years have you had occasion to go down past Post Office Bar in the nighttime?

A. When I was with Luckenbach there was a couple of times a week, three times, perhaps.

Q. The hazards of navigation are somewhat greater in the narrow channels here at night than they are in the daytime, are they not?

A. No, not if they comply with the rules.

Q. Not if they comply with the rules?

A. Yes.

Q. Why, then, did the American-Hawaiian stop operating its vessels for a number of years?

Mr. Wood: It seems to me that is a matter of company policy.

A. I don't know. [416]

Mr. Young: The witness says he doesn't know the answer, so that is sufficient for that.

Q. Captain, you have testified that the time that the accident with the Barry "K" occurred that the draft of the Pennsylvanian was 19 feet 2 inches astern and about 15 feet forward?

A. Just about. I couldn't tell you exactly to the inch.

(Testimony of John Norberg.)

Q. Did you check those draft figures before you started out from Portland harbor with the Pennsylvanian that night?

A. I got it out of the log book.

Q. You got it out of the log book?

A. Yes.

Q. I mean, did you look into that matter when you started out from Portland harbor?

A. Sure.

Q. That is something that you wanted to know before you started piloting the vessel; is that correct? A. That is the way every pilot does.

Q. Now, have you ever piloted the Pennsylvanian prior to the time of the accident?

A. Lots of times.

Q. Lots of times? A. Yes.

Q. On those other occasions had she been fully loaded or only partly loaded?

A. Partly loaded. [417]

Q. Had you ever piloted her when she was fully loaded? A. Not in the river.

Q. Not in the river? A. No.

Q. Then did you know what her draft was when she was fully loaded?

A. 28 or 29 feet, I believe, according to the season of the year.

Q. What cargo was she carrying at the time of this accident; do you know? What was the nature of the cargo? A. General.

Q. Now, when you say she was partly loaded, to what extent was she loaded; do you know?

(Testimony of John Norberg.)

A. Well, she had anywheres from five or six hundred ton to maybe 3,000 ton.

Q. Do you know what her total cargo capacity was? A. No.

Q. You testified that at the time the accident happened there was on the bridge Captain Vaux, the Third Officer Nelson, and yourself; is that right? A. Right.

Q. Well, didn't you have a quartermaster, a watchman, on the bridge?

A. Sure, a quartermaster.

Q. The quartermaster was acting under your directions, was he not? A. Yes.

Q. With the windows on the bridge open that night?

A. I think they was closed; some of them was closed and some of [418] them open.

Q. Where were you personally stationed before this accident occurred?

A. From one end of the bridge to the other.

Q. That is, you mean you paced back and forth from one side to the other? A. Yes, sir.

Q. Is that bridge enclosed on the Pennsylvanian?

A. Well, it is enclosed but they got doors on each side. You go right through the bridge out to the flying bridge.

Q. Were you on the flying bridge?

A. Part of the time.

Q. Part of the time. What I mean is, in the

(Testimony of John Norberg.)

space where you were pacing back and forth, was there glass ahead of you, forward of you?

A. No, not outside.

Q. Not outside? A. No.

Q. Were you outside before the accident happened? A. Yes.

Q. Is that where you were at the time of the accident?

A. Just about outside at the time, because I was going from one side to the other and taking bearings.

Q. At the time that you heard the first whistle of the Barry "K", were you then outside? [419]

A. Yes, I was outside on the corner of the bridge.

Q. And who was nearest to you at that time?

A. Captain Vaux.

Q. How far away was he from you?

A. A couple of feet.

Q. And where was the watchman? Who was at the wheel; where is the wheel located?

A. It is inside.

Q. Inside the cabin?

A. Inside the pilot house.

Q. Inside the pilot house, yes. Was there any communication between you and the watchman at that point?

A. No, not at that point.

Q. If you wanted to give him an order from where you were then standing, could you do so?

A. I could just turn right around and tell him.

(Testimony of John Norberg.)

Q. Now, you testified that the first whistle you heard of the Barry "K" was one blast; is that right?

A. Yes.

Q. You have also mentioned that there is a practice on the American-Hawaiian vessels for the pilot to confer with the other men on the bridge as to the identity of a whistle; is that right?

A. Yes.

Q. How long has that practice been in existence?

[420]

A. As long as I have been there.

Q. As long as you have been with the American-Hawaiian?

A. Yes.

Q. Had you ever encountered that practice on any other ship that you ever piloted?

A. Well, I wouldn't say. I can't remember how the rules was with Luckenbach.

Q. You don't remember about that. How about any other vessels that you may have been piloting; was there any practice——

A. I didn't pilot any other vessels but the American-Hawaiian.

Q. Didn't you pilot vessels for the Luckenbach?

A. Yes, that is what I said.

Q. And you don't remember any such practice with them?

A. No.

Q. Before you were with the Luckenbach, did you pilot any other vessels for any other companies?

A. No.

Q. What sort of work were you doing then?

The Court: He means not on the river.

(Testimony of John Norberg.)

Mr. Young: Did you pilot vessels for other companies anywhere?

A. No, except for American-Hawaiian and Luckenbach.

Q. You mentioned that your licenses, however,——

A. That is the licenses in different ports.

Q. I mean in other ports or on the high seas.

[421]

A. Yes.

Q. Was there any company you ever worked for or for whom you piloted vessels where this practice of the pilot conferring with other members or conferring with anyone who was on the deck about the identity of the whistle of an approaching ship——

A. It is always a practice on all ships, especially in hazy weather and foggy weather when you hear that whistle, “Did you hear that whistle; in what direction?” and so on; then they commence to figure out where that whistle came from, and so on. That is a standard practice among the seafaring class.

Q. Is it not a fact, Captain, that the practice to which you refer is one that exists when there is some reason for you as pilot to doubt what the nature of that whistle may be?

A. No.

Q. That is not true?

A. No.

Q. Even though you in your own mind are perfectly convinced that you hear, say, one blast, nevertheless, as a matter of course, you check it with all the other men on the bridge; is that right?

(Testimony of John Norberg.)

A. Yes, sir.

Q. In other words, you always sort of go into a huddle with them to decide what the signal is?

A. No.

Q. You don't do that?

A. No, we always adhere to the whistles. [422]

Q. Captain, in your testimony before the Inspector, I will ask you whether you were asked this question by the Inspector and you gave this answer: "Question: Now, soon after sighting the vessel, did you hear a signal from her? Answer: Off the range and heading down I heard one blast of the whistle. Question: When you heard that one blast of the whistle, did the Third Mate mention it to you? Answer: Yes."

Now, who spoke first at that time; did the Mate speak to you and mention what the whistle was or did you speak to the Mate?

A. Well, I can't recollect that.

Q. Well, did you testify as I have indicated?

A. Yes, sir.

Q. Pardon?

A. I think I spoke first; I believe I did; I wouldn't be sure.

Q. And then continuing in response to the last question, did you give this further answer: "I asked the Captain, 'Was that one blast?' and he said, 'Yes'." Did you so testify? A. Yes.

Q. "And I said, 'Did you hear that?' and the Third Mate said, 'Yes, I heard one blast,' and I heard it myself"? A. Yes.

(Testimony of John Norberg.)

Q. Now, at that time, Captain, you did not say anything, did you, about this practice which existed on the American-Hawaiian vessels of your confering with other persons on the bridge, did you? [423]

A. I wasn't asked that question.

Q. I see. You didn't volunteer any information to that effect at least, did you? A. No.

Q. In the course of your experience in the operation of vessels down the Willamette River, how many times would you say you have been past Post Office Bar?

A. About seven or eight hundred times; a rough estimate.

Q. Now, at the place which you have marked on the map as being the point where the Pennsylvanian was when you first saw the Barry "K", immediately on your starboard side, what is the nature of the ground on the east shore? There is a bend there, isn't there, in the river?

A. A small turn, a small curve.

Q. There is a curve there?

A. Yes, a small curve.

Q. And there are trees over on that side, are there not? A. Yes, some trees there.

Q. Yes. Well, now, you saw the Barry "K" at the first time that there was any opportunity to see a vessel coming upstream in view of the existence of that bend, did you not? A. Yes.

Q. How is that? A. Beg pardon?

(The last question was read by the reporter.)

(Testimony of John Norberg.)

A. Yes, I did.

Q. In other words, prior to the time that you have testified that you did see the Barry "K", the existence of that bend would have prevented you from seeing it at any earlier time?

A. No, not that time of the year.

Q. Not that time of the year? A. No.

Q. What did you mean, then, when you said a moment ago that you did see her the first time?

A. I saw her—I understood you to say that I wouldn't see her; is that what you said?

Q. I asked you whether you, in view of the existence of the bend in the stream, saw the Barry "K" as soon as the bend would permit you to see her? A. Yes.

Q. That is right. You have testified that you were just about to go off Post Office range when you first saw the Barry "K"? A. I was going off.

Q. Just going off. Very well.

A. I was going off.

Q. How far would you say that you were up the range from, say, Post Office Bar Front light at the time that you went off the range?

A. Well, it was about——

Mr. Wood: Well, if the Court please, he has marked it on the [425] chart. I don't see how he could be any more accurate than that.

Mr. Young: This is cross examination, your Honor; he wasn't measuring it on the chart at the time of the accident.

(Testimony of John Norberg.)

The Court: That is right.

Mr. Young: Q. Just answer the question, please. Captain.

The Court: Q. How far up the range were you?

A. Well, the front range. I should judge, about seven hundred yards, six or seven hundred yards.

Q. Six to seven hundred yards. A. Yes.

Q. Well, now, how long do you understand that range to be, however? What is the total length of that range; do you know?

A. Oh, I couldn't tell you. We can see that range way up to St. John's, past Clark-Wilson's.

Q. As a matter of fact—pardon me. Did you finish your answer? A. Yes.

Q. As a matter of fact, Captain, isn't it true that steamers going down that range generally go much further down the range towards the west side than you did that night? A. Not necessarily.

Q. What do you mean, "not necessarily"?

A. You can go off anywheres there; the whole river is a channel there.

Q. You could have gone another two or three hundred yards down [426] the range and still have been in the channel, couldn't you?

A. Yes, sure, but it wasn't necessary.

Q. It wasn't necessary? A. No.

Q. You have mentioned that you could do that and still be in a channel. When you speak of "channel," you are talking about the 800-foot channel, are you not? A. Yes.

(Testimony of John Norberg.)

Q. And what water do you understand there is in the 800 foot channel?

A. Nothing less than thirty-five feet.

Q. There is thirty-five feet in the 800-foot channel? A. Yes; it shows right there.

Q. Well, then that is your understanding, that it is thirty-five feet in the 800-foot channel; is that right? A. Yes.

Q. Is there thirty-five feet of water in the 800-foot channel at the point where this collision occurred? A. Just about.

Q. Just about. How wide is the thirty-foot channel?

A. I don't know where the thirty-foot channel is; only a small strip there that is thirty feet.

Q. Well, you didn't concern yourself about the thirty-foot channel; is that right? A. No.

Q. You concerned yourself about the thirty-five-foot channel, [427] which you say is 800 feet wide?

A. The thirty-five-foot channel goes right up against the trees almost.

Q. Which channel goes up against the trees?

A. I say almost; I say it is almost, not——

Q. That is the thirty-five-foot channel?

A. Yes. It goes down to about twenty-four, just close by there, close to thirty-five. There you are.

Q. Well, now, Captain, will you step down to this map, please? What is the line to which I am now pointing? A. Oh, that is the shoreline.

Q. That is the shoreline, isn't it? A. Yes.

(Testimony of John Norberg.)

Q. What is the dotted line to which I am now pointing——

Mr. Wood: He has a right to look at the legend.

Mr. Young: Well, if he needs to. He doesn't need the assistance of counsel. If he needs to, he certainly may.

Mr. Wood: He has a right to see what the legend says before he is asked what a dotted line means.

A. Thirty-foot channel is the dotted line. Here is the thirty-five foot channel—this is the thirty-foot channel, right in there, just close by one another.

Mr. Young: Q. They are right close by one another? A. Yes, right close up.

Q. Now, Captain, the line to which I am now pointing and which [428] you have indicated, is a dividing line between the thirty and thirty-five-foot channel; is that right? A. Just about.

Q. Yes. How far is that from the east shore?

A. Well, I haven't measured that off.

Q. Can you do that with a pair of dividers?

A. Well, sure. Where do you want it from?

Q. Well, take it at the point of the collision over to the east shore. A. You want it over here?

Q. That is right. A. It is feet, ain't it?

Q. Yes. A. 400 feet.

Q. Now, Captain, in order that we may understand, this 400 feet of width that you have mentioned is all water, isn't it?

A. Yes, a few feet of water there.

Q. A few feet of water? A. Yes.

(Testimony of John Norberg.)

Q. Then between this boundary line that you have mentioned, between the thirty-five-foot channel and the thirty-foot channel there is 400 feet of water over to the east shore at the point where the accident happened; is that right?

A. Yes, but you can't get up there.

Q. That is what I am getting at. [429]

A. No vessel goes up there.

Mr. Wood: Q. You mean no deep-sea vessel?

A. Yes.

Mr. Young: Q. However, Captain, a light-draft river boat could proceed through that 400 feet of water in safety to itself, couldn't it?

A. No doubt about that.

Q. No doubt about that? A. No.

Q. During the past two years, I think you said you have been operating at night for the American-Hawaiian and during that period how much of the time, how frequently, would you say you have operated an American-Hawaiian vessel past Post Office Bar in the nighttime?

A. Twice a week passing there.

Q. Twice a week?

A. Yes; sometimes longer periods and sometimes shorter periods.

Q. Now, you have testified that you have hundreds of times passed ocean vessels port to port at that point? A. Yes.

Q. Now, have you ever had occasion to meet river boats at that point? A. Yes.

(Testimony of John Norberg.)

Q. In the night-time? A. Yes. [430]

Q. And how have you passed the river boats?

A. Most of the river boats take the port passing at nighttime.

Q. Most of the river boats take the port passing in the nighttime? A. Yes, port to port.

Q. Has that been your actual experience?

A. That is my actual experience?

The Court: Q. With tows?

Mr. Young: Q. Have they been with tows?

A. Yes.

Q. Now, what sort of tows? A. Barges.

Q. Barges and what?

A. Yes, barges, yes.

Q. Have you passed any river boats, for instance, at that point with log rafts? A. Yes.

Q. And on which side of the river have they passed you? A. They keep to the east side.

Q. They keep to the east side. The log rafts keep to the east side? A. Yes.

Q. Has that been pretty uniform, that you have always expected them to keep to the east side?

A. No, not always.

Q. Not always? [431] A. No.

Q. To what extent would you say the river boats with barges have used the east as distinguished from the west side, in your experience?

A. Well, fifty-fifty, mostly.

Q. Fifty-fifty. I will say nighttime?

A. At nighttime?

(Testimony of John Norberg.)

Q. Yes. How about daytime?

A. Daytime we don't pay no attention; we go all over then.

Q. You go all over then? A. Yes.

Q. In the daytime do the river boats use the east side at all?

A. Oh, yes, they use the east side, the west side; it just depends on where they are going, where they come from.

Q. Now, Captain, from your experience in the use of the river down past Post Office Bar in at least fifty per cent of the cases, you might expect that the river boat would be coming upstream over on the east side; is that right? A. No.

Q. I thought you said that the river boats used it about fifty-fifty?

The Court: Confine it to river boats with tows.

Mr. Young: River boats with tows, about fifty-fifty used the east side; is that right?

A. Yes. [432]

Q. Well, then, in piloting the Pennsylvanian down the Columbia River that night, it was no surprise to you to see a river boat with tow coming up the east side, was it?

A. No, I expected it to be over on the west side.

Q. You expected it to be on the west side?

A. Yes, she looked like she was on the west side.

Q. I am asking you whether, isn't it a fact that you may have well expected to see a river boat on the east side of the river that night based upon your prior experience? A. No.

(Testimony of John Norberg.)

Q. Well, then, what did you mean when you said a few minutes ago that you knew that river boats did at least to some extent with tows use the east side of the river?

A. I didn't expect that boat, which looks to be a large tug.

Q. It looked like a large tug? A. Yes.

Q. That boat, however, you say had a tow, didn't it? A. Yes.

Q. And you knew that it had a tow when you first saw it, did you not? A. Yes.

Q. How did you know that?

A. By the lights.

Q. And what lights were those?

A. Two mast lights. [433]

Q. Two mast lights? A. Yes.

Q. What did those two mast lights indicate to you as to the exact nature of that tow?

A. A barge or something alongside.

Q. A barge or something alongside?

A. Yes.

Q. I will ask you to state whether in your testimony before the Inspector on February 4, 1941, you were asked these questions and you gave these answers: "Question: When you sighted the vessel ahead, what lights did you see? Answer: Regulation towing lights and red port light." You so testified? A. Yes.

Q. Now, when you used the words "regulation towing lights," you meant these two mast lights?

A. Yes.

(Testimony of John Norberg.)

Q. "You saw the red side light and the towing lights? Answer: Yes." Did you so testify?

A. Yes.

Q. You were asked this question: "You saw the red side lights? Answer: Yes. Question: And the towing lights? Answer: Yes." You so testified?

A. Yes.

Q. "Question: At that time did you know there was a barge being pushed ahead of the vessel? Answer: No." Did you so testify? [434]

A. Yes.

Q. However, you have just said that you knew there was a barge being pushed in some manner by the vessel, haven't you?

A. Tied up alongside, perhaps.

Q. Alongside? A. Yes.

Q. Very well. I will ask you, were you not asked this further question and did you not give this answer: "Question: When you saw those lights, what did you figure was ahead? Answer: I couldn't figure anything except a tug boat pulling a log raft or something. I didn't see any tow." Did you so answer? A. Yes.

Q. Well, now, why did you say that you couldn't figure anything except the tug boat pulling a log raft?

Mr. Wood: Or something.

A. I couldn't see no lights on the tow. The lights will show what they got, what they are towing.

(Testimony of John Norberg.)

Q. Now, Captain, if that boat had been pulling a log raft, what lights would it have had on its mast? A. Three lights.

Q. Three? A. Yes.

Q. And you didn't see three, did you?

A. No. [435]

Q. It had just two? A. Yes.

Q. Isn't it a fact then that you knew that boat was not pulling a log raft?

A. Lots of times, you know, the light will go out. I have seen lots of times that the light will flicker out and they come with two lights when she should have three and you can't never depend on the lights. They will break down occasionally, too, like everything else, so you have to be careful about that, you know, when you navigate in the rivers.

Q. Well, Captain, in the absence of any information otherwise, wouldn't you, when you saw those two mast lights, assume that there was no log raft behind; isn't that true?

A. You might have something behind. I have seen them come up there with no lights sometimes.

Q. Captain, when you say that you actually saw the two mast lights—— A. Yes.

Q. ——the first thing that would flash across your mind would be that that boat does not have a tow, does not have a log raft behind; isn't that true?

A. Yes.

Q. However, on this particular night you were in doubt as to what she was pulling; is that right?

A. What? [436]

(Testimony of John Norberg.)

Q. On the night of this accident you seemed to be in doubt as to whether she had barges alongside or was pulling a raft behind; is that right?

A. No, I wasn't in doubt; I just waited until I got up to her.

Q. You waited until you got up to her to see what she did have; is that right?

A. Well,—

Q. Now, you testified, Captain, that you saw the two mast lights, that is, the white lights above each other and you saw one of the side lights; is that correct?

A. Yes.

Q. Now, which one was that?

A. The port light.

Q. The port light. A. The red light.

Q. That would be the red light. You also said you saw some deck lights. Now, where were those?

A. Right along the house on the port side of the steamer.

Q. Well, now, are those lights that you mean were coming out from cabin windows or something of that sort?

A. Under the ceiling, I suppose, and along the house.

Q. They were not navigation lights?

A. No.

Q. In any event, you knew where the boat was as you looked at it, did you not? [437]

A. I could see the angle where she was heading by those house lights. If she had come head-on.

(Testimony of John Norberg.)

I couldn't have seen those lights, but she was heading away from me. That is why I saw the lights on the port side.

Q. The only lights which you state gave you any information as to what this boat was towing were just the two mast lights; is that correct?

A. Yes.

Q. Now, if you had assumed that there was a log raft behind that boat, you would have had no way of knowing how long the log raft was, would you?

A. No, not at that point.

Q. How close would you have to get to determine that?

A. Well, half a mile or so.

Q. Well, if it had a log raft, say, a thousand feet long, you certainly wouldn't expect that boat to cross the river and get over on the west side, would you?

A. Why not? They got the storage booms down there on that side.

Q. Would you have expected a river boat with a tow a thousand feet long to have crossed your bow that night, to get over onto the west side of the river?

A. I didn't expect anything; I just took the circumstances as they came.

Q. Well, I am asking you, you were uncertain as to what this boat was pulling, weren't you? [438]

A. She was a tug, so she must have something.

Q. You said you didn't know but what it might be a tow of logs?

(Testimony of John Norberg.)

A. She had something; I knew she was pulling something.

Q. Now, I am asking you the question, Captain, if that boat were pulling a log raft, say of a thousand feet in length, you certainly wouldn't expect to have to stop in the river and wait there until that boat crossed the stream to the west side, so that you could make a port to port passage, would you? A. Sure.

Q. You would expect to do that?

A. Oh, yes. We have done that all the time.

Q. I see. And the log rafts just go right across the river in the nighttime there, across your bow?

A. Yes. We do that often, quite often.

Q. How frequently have you ever had that experience at this particular point?

A. I can't remember any particular time or anything. We never check up all those things.

Q. Now, is there any difference in the speed at which you operate one of your American-Hawaiian vessels going downstream with respect to whether you are within the city limits or are below the city limits?

A. The city limits is always the speed limit, you know.

Q. What is that speed limit?

A. Well, you can go about eight knots, six to eight knots. [439]

Q. Yes, but you are outside the city limits when you reach the vicinity of Post Office Bar, aren't you? A. Yes.

(Testimony of John Norberg.)

Q. Where are those city limits with reference to the place of this accident?

A. At Terminal 4, a little above West Oregon mill.

Q. The speed limit does not apply, then, below the West Oregon mill, does it? A. No.

Q. Before you saw the Barry "K", what was your speed? A. Going slow.

Q. Well, how slow?

A. Four knots, I should judge.

Q. And when you first saw the Barry "K", what did you do with your speed?

A. I had just started full speed when I saw the Barry "K".

Q. You say you had started full speed?

A. Yes, just about the time I sighted her.

Q. And throughout what distance did you continue full speed?

A. Oh, there was just a minute or two, perhaps. It didn't make much difference in the speed hardly. We gained, perhaps, about three or four miles an hour in the long run.

Q. Well, when you first saw the Barry "K", you didn't change your speed, did you?

A. No. [440]

Q. You were still going full speed ahead then, weren't you? A. Yes.

Q. If your boat were traveling at full speed under the circumstances which existed at the time of this accident, how fast would she be going through the water? A. Twelve knots.

(Testimony of John Norberg.)

Q. Twelve knots? A. Yes.

Q. And translating that into English miles, what would that be?

A. Well, it would be about thirteen and a half.

Q. Thirteen and a half miles per hour?

A. Yes.

Q. Now, would you add to that the amount of current in the river or does that allow for current?

A. Well, in the Willamette River there is hardly any current here.

Q. You testified there was between a half a knot to a knot, didn't you?

A. Yes; that doesn't make much difference in fifteen or twenty minutes.

Q. Well, now, but for the difficulty which you got into on this signal question, what would you have done about the speed of your vessel in going down past this approaching river boat?

A. I was going half speed; I had it down to half speed. [441]

Q. But you didn't put her down to half speed when you first saw the vessel, did you?

A. No, she was far enough away then, you know; you have got plenty of time to slow up.

Q. And what point of time, but for what took place there, would you have slowed her up?

A. Oh, just about the time I slowed her down.

Q. And how far were you from her when you started to slow down?

(Testimony of John Norberg.)

A. Oh, a good half a mile or more.

Q. At what speed would you have expected to pass that river boat?

A. Oh, about four knots; perhaps less; three or four knots.

Q. And what is the reason that you would have slowed down?

A. Well, I would slow down to pass a tug.

Q. Why?

A. Well, we don't want to embarrass the tug.

Q. Why would you embarrass the tug?

A. Well, they always got some barges and one thing and another.

Q. Might break the lines, for instance?

A. Break the lines or jump the logs out of the booms, or something.

Q. What was the maximum speed that your boat attained before the accident?

A. About seven knots, I should judge.

Q. Traveling at seven knots an hour going downstream, if you wanted to stop that vessel completely, in what distance would you [442] be able to bring her to a stop?

A. Oh, about half a mile.

Q. Half a mile?

A. Perhaps. It just depends on the conditions, the draft of the vessel, and so on.

Q. Well, the American-Hawaiian Pennsylvanian is a pretty efficient craft, isn't it?

A. Yes.

(Testimony of John Norberg.)

Q. If you proceeded to stop her, she will stop as rapidly as most other ships, won't she?

A. Yes.

Q. Of an ocean-going type? A. Yes.

Q. At the time that you actually did give the order to stop, what was the speed of the Pennsylvanian?

A. She was about seven knots then.

Q. She was seven knots——

A. No, when I ordered half speed, you know, then she slowed down, I should say, to about five knots.

Q. Then when you ordered the engines full astern, at that time what was the speed?

A. Well, about four or five knots, I should judge; it is pretty hard to tell.

Q. How far were you from the Barry "K" at that time?

A. Oh, about a quarter of a mile. [443]

Q. What distance would it take you to stop going four or five knots an hour?

A. Oh, if that object is still, don't move through the water, I will stop in that quarter of a mile.

Q. You will stop in that distance?

A. Yes, if that object is still, but if it moves towards me, I couldn't do it.

Q. Well, at the time that you gave the order to full speed astern, though, the Barry "K" was going over towards the east side of the river, wasn't she? A. Yes.

(Testimony of John Norberg.)

Q. In other words, she was cutting across your course then?

A. She was crossing my bow then.

Q. Captain, was the Pennsylvanian equipped with anchors on her forecastle head?

A. Yes.

Q. Did you examine the anchors that night?

A. It is up to the Mates to do that.

Q. Wasn't it part of your business as a pilot to know whether the anchors were in condition to be used? A. Yes.

Q. Were they in condition to be used that night? A. They were.

Q. They were? A. Yes. [444]

Q. Who was on the forecastle head that night to lower the anchor if you ordered it to be dropped?

A. There was no one there. We had passed the city limits; the Mate goes off the forecastle head; we don't anticipate any trouble that we would have to let go the anchor every turn we make in the river. We don't anticipate that.

Q. Well, accidents are never anticipated, are they; you don't expect to have accidents?

A. No, that is it.

Q. Nevertheless, in the operation of your boat you have to allow for that contingency, don't you?

A. Oh, yes.

Q. Well, how many anchors did she have on the forecastle head? A. Two.

Q. Were those anchors in condition that they

(Testimony of John Norberg.)

could be lowered that night if orders were given to have them lowered?

A. Yes, but in close quarters the anchors are no good.

Q. Well, just a minute. Just answer my questions, please, Captain. As I understand, there was nobody on the forecastle head that night who could drop those anchors if you gave the order to drop them; is that right?

Mr. Wood: If your Honor please, I am going to object to this line of examination. There isn't any semblance of a charge in the pleadings to substantiate any evidence of this kind. It is perfectly ridiculous. No ship keeps a Mate on the forecastle [445] head going down the river to drop anchor. There isn't anything charged about it and I object to it.

Mr. Young: Counsel always makes very powerful assertions as to what the practices are, your Honor, and I take issue definitely with him on that particular point. The libel in this case expressly charges that the Pennsylvanian did not stop at any time before the accident. Now, one of the methods of stopping a vessel is to throw out the anchor. This is simply a detail under the general charge.

The Court: Continue.

(The last question was read by the reporter.)

A. Yes, that is right.

(Testimony of John Norberg.)

Mr. Young: Q. That is correct? A. Yes.

Q. And at no time that night did you ever give the order to anyone to drop the anchors, did you?

A. No.

Q. Assuming, Captain, that there had been a member of the crew on the forecastle head whose duty it would have been to drop the anchors under orders, how long would it take to get either one or the other of the anchors down from the time the order is given?

A. About four or five minutes.

Q. Four or five minutes? A. Yes.

Q. Are you sure of that? [446] A. Yes.

Q. Have you ever had the experience that it would take four or five minutes to get the anchors down?

A. To get him out from his quarters and send him up there in the forecastle head, he has got about 200 feet to walk or run.

Q. Captain, the question that I asked you assumed that there was someone on the forecastle head to obey your orders when you gave them. Now, assume the man is actually there and you order him, let us say, to drop the starboard anchor, how long would it take him actually to get that anchor out?

A. He could get it out right away, if he is there.

Q. If he is there? A. Yes.

Q. If he is not there, of course he wouldn't get it out right away? A. No.

(Testimony of John Norberg.)

Q. Now, Captain, the whistle which you first say you heard from the Barry "K" was one blast; is that correct? A. Yes.

Q. And then you answered with one blast?

A. Yes, sir.

Q. Is that right? A. Yes.

Q. That called for a port to port passage?

A. Yes.

Q. What was the next blast, though, you heard from the Barry "K"? [447]

A. A group of whistles.

Q. Now, when you heard the group of whistles, were you able to identify what they were?

A. No.

Q. Do you know how many blasts there were?

A. Oh, there was five or six of them.

Q. What would five or six blasts mean to you?

A. Well, four blasts means danger signals and five or six or seven, I suppose they mean the same thing to some people.

Q. Well, as a matter of fact, don't the pilot rules provide that the danger signal is four or more blasts?

A. Yes; we generally use four on ships.

Q. Well, if you then had heard four or more blasts, you would understand that to be a danger signal, wouldn't you? A. Yes.

Q. Now, at the time that you heard this first group of blasts from the Barry "K", how far was the Pennsylvanian from her?

(Testimony of John Norberg.)

A. Well, I guess a couple of thousand feet anyway.

Q. A couple of thousand feet?

A. Yes, all of that.

Q. At that time what orders did you give?

A. Either half speed or stop.

Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do? [448]

A. Well, we will call it half speed, then.

Q. Call it half speed. How much time elapsed between the time you heard the first group of whistles from the Barry "K" and the second group?

A. Not very long. They came right on top of one another.

Q. You heard as a matter of fact three of these grouped whistles, didn't you? A. Just about.

Q. And was each one of those three a series of whistles of at least four in number?

A. Yes, all of that.

Q. Then each of those groups of whistles necessarily meant to you a danger whistle, didn't it?

A. Yes.

Q. And the first one of those you heard when you were two thousand feet apart; is that right?

A. Yes.

Q. But there was no point of time when you got stopped before the collision occurred, was there?

A. Beg pardon?

(Testimony of John Norberg.)

Q. Your vessel did not come to a stop at any time before the collision occurred?

A. No, she had a little headway when the collision took place, or else the other one pushed the barge up against us, either one.

Q. Well, was the Barry "K" moving when the collision occurred; [449] do you know?

A. Yes.

Q. How fast was she moving?

A. Well, she wasn't moving very fast. We was swinging away from her and she was coming in close on us faster than we could swing away from her.

Q. At the time you heard that first danger signal from the Barry "K", was she then crossing your bow towards the east bank?

A. No, she was away over on the other side, at least she was on our port bow.

Q. On your port bow? A. Yes.

Q. What running light did you see at that time?

A. I saw her the first time, you know, I saw a red light.

Q. Yes. Then you saw the green light just after?

A. Then it came back with another group of blasts and she showed a green light.

Q. What I want to get at is this: When did you see the green light with reference to the time that you heard this first group of blasts from the Barry "K"?

(Testimony of John Norberg.)

A. There was a second group of blasts; I saw the green light.

Q. The second group of blasts? A. Yes.

Q. And how far apart were the vessels at that time?

A. 1,500 feet or more. Twelve or fifteen hundred feet, I should [450] judge.

Q. And at that time the Barry "K" was then crossing your bow toward the east bank, wasn't it?

A. Yes. Apparently looked that way.

Q. Pardon?

A. Apparently looked that way.

Q. That would be obvious to you if you saw her green light, wouldn't it? A. Yes.

Q. Now, you could follow her course then, couldn't you, by that green light; isn't that right?

A. What do you mean by follow——

Q. As long as you saw her green light?

A. Yes.

Q. You knew that she had her starboard side towards you, didn't she? A. Yes.

Q. And she must, therefore, be going toward the east bank? A. Yes.

Q. Was there any point of time when you ever gave orders to veer the bow of your ship around to your port side?

A. No, it couldn't be done at that time.

Q. Why couldn't it be done?

A. Too close.

Q. Well, you have said that you heard the

(Testimony of John Norberg.)

first danger signal [451] when you were two thousand feet away, didn't you? A. Yes.

Q. And the second danger signal when you were somewheres around 1,500 feet away?

A. Yes.

Q. Is 1,500 feet too close? A. Yes.

Q. To swing the bow of your vessel?

A. Yes, when the vessel is about two points on the port side, it is too close.

Q. Well, isn't it a fact that if you had swung that vessel as little as one or two points to your port side, you would have missed the Barry "K" altogether? A. No, I would have hit her.

Q. You would have hit her? A. Yes.

Q. You have testified that you saw no lights whatever on the barges until you were right up close; is that it; is that correct?

A. Didn't see no light before or after the collision.

Q. Either before or after the collision?

A. Just after the collision we found a little lantern there.

Q. How close were you to the barge at the time that you put the search light on the barge?

A. The barge was right alongside of us, a little ahead of us.

Q. Were you in contact with the barge at that time? [452]

A. No, we was clear of the barge.

Q. In the clear of the barge?

(Testimony of John Norberg.)

A. Yes.

Q. Were there any other lights around there at that time other than your search light playing on the barges? A. No, just our search light.

Q. Just your search light? A. Yes.

Q. Were the lights in any of the cabins of the Barry "K" lighted up at about that time or just after the collision occurred?

A. No, the Barry "K" was laying on the west side of the river then.

Q. Well, now let me get this clear. At the time that you were inspecting these barges with your search light to see whether they had any lights on them—— A. Yes.

Q. ——do I understand the Barry "K" was across the river at that time? A. Yes.

Q. Well, then, this is sometime after the accident?

A. No, the Barry "K" backed away right away as soon as we hit the barge, she backed away and she went across on the other side.

Q. She stayed there long enough for you to have some conversation with her skipper, didn't she? A. No, I don't—— [453]

Q. Didn't you say you called out to see if there was any help that could be given, you or Captain Vaux? A. Captain Vaux——

Q. Then do I understand that just after that she backed across the river?

A. She was backing away across the river at that time.

(Testimony of John Norberg.)

Q. Now, the time, however, when you played the search light on the barges was after the Barry "K" had gotten over to the west side of the river; is that correct?

A. She was going over there then.

Q. She was going over? A. Yes.

Q. How far across was she at that time?

A. Oh, I couldn't watch the Barry "K" and the barges and the ship and all at one time.

Q. Now, did you play your search light all around those barges? A. Yes.

Q. Both barges? A. Yes.

Q. Were you ever able to determine which barge was on the nose of the Barry "K"; did you see any number? A. Yes, 22.

Q. Did you see the number on the barge?

A. Yes, we saw the lights on it.

Q. And which barge was it on which you saw this little lantern [454] that you were talking about? A. It was on 22.

Q. On 22? A. Yes.

Q. Now, which corner was the lantern on?

A. On the corner—well, we seen the barge up this way, on the port corner when the barge swung around.

Q. On the port corner of barge 22?

A. Yes.

Q. Which corner, forward or aft?

A. Supposed to be aft, I guess, after the barge swung around.

(Testimony of John Norberg.)

Mr. Wood: Q. After it swung around, he said.

A. (Continuing) Yes.

Mr. Young: Q. At the hearing before the Inspector were you asked this question and did you give this answer: "At the time of the collision or thereabouts did you see any lights on the barge? Answer: Just as the collision took place I saw a light on one corner of the barge, some light standing on the deck, on the corner of the barge next to the tug"? A. Yes.

Q. Is that right? A. Yes, sir.

Q. On the corner of the barge next to the tug. Well, now, is that the barge that was on the nose of the tug? A. I presume it was. [455]

Q. Then, if the light was on the corner of the barge next to the tug, it would be on the after corner, wouldn't it?

Mr. Wood: Pardon me, if your Honor please. Counsel, I think, has misinterpreted that testimony. It isn't the corner next to the tug he is talking about; it is the barge next to the tug.

Mr. Young: Well, if the Court please, I am cross examining this witness; it seems to me this witness doesn't need the help of counsel. I will read this answer again so that if there is any clarification the witness wishes to give, he is very welcome to do so.

Q. I want now to read to you your answer at the hearing before the Inspector and will you tell me whether you so testified: "Just as the collision

(Testimony of John Norberg.)

took place I saw a light on one corner of the barge, some light standing on the deck, on the corner of the barge next to the tug." Did you so testify?

A. Perhaps I did. I guess that is right.

Q. What I am getting at is this: If it is correct that the light which you saw was on the corner of the barge next to the tug, you are referring there, are you, to the barge that was being pushed on the nose of the tug; is that correct?

A. Well, the barges were mixed up at that time, you know, so they were all swinging around; they was all adrift. So I presume there was the one that was pushed, had the light next to the tug, as near as I could figure out.

Q. As near as you could figure out, yes. [456]

A. As near as I could figure out at that time, standing on deck.

Q. Now, did you see any number on that barge at the time that you saw this lantern on it?

A. Well, I can't remember if I took the number of the barge at that time or not. We just took the number of the barges and as a general routine.

Q. Well, you are not certain then as to where this lantern was that you saw?

A. I think Captain Vaux, he can inform—because he was using the search light and he was doing the figuring out and I was handling the ship.

Q. Now, how far was the other barge away at this time?

A. They wasn't very far apart.

(Testimony of John Norberg.)

Q. Did you play the search light on the other barge?

A. I believe Captain Vaux did that, you know.

Q. Did you pay any attention to the other barges.

A. Oh, yes, I was watching it.

Q. I mean after the accident now?

A. Oh, yes.

Q. Were you examining the other barge for the purpose of seeing whether there were lights on it?

A. I didn't see no lights on that other barge.

Q. Did you look to see if there were lights there?

A. Yes, but there wasn't any. I didn't see none. [457]

Mr. Young: I wonder, your Honor, if we could have just a few minutes recess?

The Court: Yes, and before we recess, Captain, you said a while back that you thought this was a large tug. Do you remember saying that?

A. Yes.

Q. And then you followed that by saying, which it seemed to me had some connection with the size of the tug, that you thought she was—that you expected her to be on the west side of the channel?

A. That is right.

Q. Just explain that a little further.

A. Yes. Large tugs, when they come up, you know, as a rule they take the curve right—you take those little diesel boats that comes up, they go almost anywheres; they don't take up much room. Small ones.

(Testimony of John Norberg.)

The Court: We will recess now for fifteen minutes.

(Whereupon at 9:40 o'clock A. M. a short recess was taken.)

Mr. Young: Q. Captain Norberg, how far is the bridge of the Pennsylvanian from the bow of the ship, approximately?

A. I guess about 200—I couldn't tell you.

Q. The ship itself is something over 400 feet long, isn't it? A. Yes.

Q. Are you half way back towards the stern?

A. I think the bridge is forward of midships; I believe so; I wouldn't say. [458]

Q. The bridge is forward of midships?

A. I believe so.

Q. There is a substantial part, however, of the vessel that is between you and the bow, isn't there, when you are on the bridge? A. Yes.

Q. How high are you above the water level when you are on the bridge?

A. Well, that is a problem—I think 38 feet is the height of the eye, or something like that.

Q. About 38 feet?

A. Something like that.

Q. How many independent pilots are there in the Columbia-Willamette rivers territory?

A. There are six or seven.

Q. Six or seven? A. Yes.

Q. Do you know how many pilots there are that belong to the association? A. I don't know.

(Testimony of John Norberg.)

Q. Do you think there might be thirty, thirty-five? A. I suppose so; I don't know.

Q. You don't know about that.

Mr. Young: That is all.

Redirect Examination [459]

By Mr. Wood:

Q. Just along the line of that last question about the independent pilots and the Columbia River association pilots, what is the feeling between the association pilots and the independent pilots?

A. Not very good.

Q. Not good. And the association pilots are members of a union, are they not?

A. Yes, sir.

Q. To which you men refuse to belong; is that the fact?

A. We got expelled out of it.

Q. Now, Captain Norberg, you answered some questions about where you had piloted and said that your piloting had been for the American-Hawaiian and Luckenbach only, and I think the Court brought out the fact that that was referring to these rivers only, the Columbia River?

A. That is right.

Q. (Continuing) And Willamette River. But is it true that you have piloted in other waters?

A. Yes, sir.

Q. And for other employers?

A. I piloted my own ship when I was Master of a ship.

Q. And what other waters have you actually served as pilot in? A. As Master and pilot?

(Testimony of John Norberg.)

Q. Yes. [460]

A. Puget Sound, adjacent inland waters, San Francisco Bay to Antioch, San Joaquin River, San Pedro, San Diego, Humboldt Bay, Coos Bay, Willapa, and Grays Harbor.

Q. Then it is not true, is it, that most of your piloting experience has been in the Columbia River and in the open sea? A. No.

Q. That is not a fact, is it; I mean you have piloted many places except the open sea, haven't you? A. Yes, lots of places.

The Court: On inland waters?

Mr. Wood: Inland waters, yes.

A. (Continuing) Inland waters.

Mr. Wood: Q. Now, when you saw the Barry "K", the lights of the Barry "K", the two white lights and the red light below you down the river, tell us again, because I have forgotten myself, about how far down you think she was.

A. About a mile; a little less, perhaps.

Q. At that time when you first saw her, could you tell on which side of the river she was on?

A. She was coming down in midchannel, I presume.

Q. I don't know what you presume; I want to know whether you could tell by her lights on which side of the river she was? A. I couldn't.

Q. So that when you marked her position there on the chart at my request, you were indicating how far down the river she [461] appeared to be rather than on which side she was; is that right?

(Testimony of John Norberg.)

A. Yes.

Q. Now, counsel asked you some questions about when you went full speed ahead as you came down the channel there and you said you did go full speed ahead. I want to know whether you are referring to full speed ahead through the water, twelve knots, or full speed ahead on your engines; which did you mean?

A. Full speed ahead on the engines.

Q. And do you know how long you went full speed ahead on your engines?

A. Three or four minutes.

Q. Would she pick up her full speed of twelve knots in that time? A. No.

Q. What maximum speed through the water did she attain, in your opinion?

A. Seven knots, perhaps; six or seven.

Q. Now, in the testimony that you gave as to when you heard the danger signals or what lights you saw from the Barry "K" when you heard her danger blasts, were you testifying from recollection or from reference to any log books or bell books or knot books or anything else?

A. Just from my own memory.

Q. You gave some testimony which seemed inconsistent to me. I will ask you about it. Do you remember testifying that when you saw the green light of the Barry "K" she was far enough away [462] from you so that you thought that she had taken some momentary sheer or got out of

(Testimony of John Norberg.)

control in some manner for a short time and would go back on her course; you so testified, didn't you?

A. Yes.

Q. That is when she was showing you her green light? A. Yes.

Q. And then a little later you testified in answer to Mr. Young's questions that when she was showing you her green light was when she blew her second blast of danger signals; do you remember saying that to him?

A. I guess it was my error.

Q. What? That is what I want to clear up, when she was showing you her red light.

A. Yes.

Q. Did she ever blow you danger signals then?

A. No, I never thought she would come back; I thought she would keep on going on her own side.

Q. And when she swung around and showed you her green light, you still thought everything was safe? A. Sure.

Q. What? A. Yes.

Q. And then it was after she showed you the green light that you heard her first blast of danger signals, was it?

A. That is about as near as—— [463]

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. Captain, did you come to any conclusion as to why the Barry "K" was blowing danger signals at all? A. No.

(Testimony of John Norberg.)

Q. You didn't have any idea why the signals were being blown?

A. I couldn't see no danger.

Q. So that so far as what you could see was concerned there was no reason at all for the Barry "K" to be blowing those danger signals?

A. No.

Mr. Young: That is all.

Mr. Wood: I forgot to ask another question I would like to ask.

Redirect Examination

By Mr. Wood:

Q. I don't really remember what you testified to about what you did with your engines when you heard the first blast of danger signals, but regardless of what you testified, in the recess that we just had did you at my request look at the bell book of the Pennsylvanian; did you look at the bell book of the Pennsylvanian? A. Yes.

Q. And what does that show that you put your engines at at 12:50? A. Full ahead.

Q. And how long does it show you ran full ahead? [464] A. 12:54.

Q. Four minutes?

A. Yes. Half and stop.

Q. Now, at 12:54 what did you do with your engines? A. Half and stop.

Q. And what does that mean, half and sop?

A. Well, two bells come together, you know.

(Testimony of John Norberg.)

Q. Does half mean half speed?

A. Yes. When you put the telegraph—you might stop for a second on half and then run it down full astern.

Q. Well, does half and stop mean that the stop followed immediately on the half?

A. Yes, a split second.

Q. So it is part of really the same signal?

A. The same signal.

Q. And that was at 12:54? A. Yes.

Q. What? A. Yes.

Q. Now, in relation to that——

The Court: In other words, it is a stop signal?

Mr. Wood: Yes.

Q. Now, at 12:54—— A. Yes.

Q. ——why did you stop then; what did you hear from the other ship [465] which caused you to stop? A. A danger signal.

Q. Was that the first one you heard?

A. Yes.

Q. How long—well, I will let the bell book speak for itself later on. Although for your Honor's information, what does the bell book show as to the time of the collision? A. 12:55.

Q. One minute after your stop?

A. Yes, full astern stop.

Q. That is, your engines were full astern at 12:55? A. Yes.

Q. What? A. Yes.

Q. And the entry in the book shows you hit at 12:55?

(Testimony of John Norberg.)

A. That is the nearest minute. Never split the minutes in the bell book.

Q. The entries in the bell book are made to the nearest minute? A. Yes, that is all.

Q. How much of an interval was there really between your full astern and the collision; how long a time? A. Pretty near a minute.

Q. What?

A. Pretty near a minute. [466]

The Court: Did the Captain say whether there were two sets of danger signals or three, or did he attempt to be specific?

Mr. Wood: I don't think he attempted to be very specific.

Mr. Young: He said three, your Honor.

Mr. Wood: I thought he said they were coming so fast; that is my recollection. I would like your Honor to ask him.

The Court: Clear it up then.

Mr. Wood: Q. Well, Captain, the Court wants to know whether you heard two sets of danger signals, three sets of danger signals, or whether they were so consecutive it was hard to tell or whatever it was; how was it?

A. I don't know how many they was; they was coming too fast and too close together. There was hardly any interval.

The Court: Q. Without any interval?

A. Yes.

Mr. Wood: That is all.

(Testimony of John Norberg.)

Mr. Young: If the Court please, I would like to have the reporter refer back to the early part of his notes, because I have very definite notes——

The Court: We can't do it now.

Mr. Young: I would like the record to show that I would like to have my notes corrected. My notes show three sets of danger signals.

The Court: The word "three" was used; whether by you or the captain, I am not sure. The Captain will be here all the time? [467]

Mr. Wood: Oh, yes.

Recross Examination

By Mr. Young:

Q. Now, the steamer Pennsylvanian would answer her helm readily, would she not?

A. Oh, yes.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [468]

EARLE B. VAUX,

produced as a witness in behalf of the Respondents,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Vaux, you were Master of the Pennsylvanian on the night of the collision with the Barry "K", weren't you? A. Yes, sir.

(Testimony of Earle B. Vaux.)

Q. And as a preliminary matter, where do you live, Captain?

A. In Seattle, 2416 42d Avenue, North.

Q. And the Court asked Captain Norberg his age; I will ask you, how old are you?

A. Thirty-five.

The Court: Q. Native born?

A. Massachusetts born.

Mr. Wood: The best kind of native born.

Mr. Young: That is a good state, too.

Mr. Wood: Q. How long had you been Master of the Pennsylvanian before this collision?

A. A year.

Q. Are you still her Master?

A. Yes, sir.

Q. Is she in port now?

A. She is en route to Portland from San Francisco now.

Q. And you came up from San Francisco ahead of the ship for the purpose of testifying here, did you not? [469]

A. Yes, that was the reason.

Q. You and Third Mate Nelson flew up, didn't you? A. That is true.

Mr. Young: My understanding is that this is his vacation period.

The Witness: Quite correct, sir.

Mr. Wood: That is rather hard on him.

Q. Captain, tell us in a general way your seafaring experience?

(Testimony of Earle B. Vaux.)

A. At the time I started at sea until the present time, is that what you wish to know?

Q. Yes, briefly; not too much detail.

A. Well, in 1924 on the schoolship Nantucket of Massachusetts, spent two years, a course, graduated as Cadet Master of the schoolship. From there I went to the American-Hawaiian Steamship Company as quartermaster in 1926, May; promotions followed one upon the other from quartermaster to Fourth Mate, to Third Mate and Second Mate, Chief Mate, and finally Master.

Q. You have been in the American-Hawaiian's employ then for quite a considerable period?

A. Yes, sir.

Q. How long have you held Master's papers?

A. Ten years.

The Court: Q. Have you been in a collision before? A. No, sir.

Q. Have you been on the witness stand before? [470]

A. Yes, sir, once in an accident for stevedores.

Mr. Wood: Q. Now, Captain Vaux, what was the night like on this collision night?

A. My recollection of the night and also my report to my office and the Steamboat Inspectors was "overcast and calm and smooth."

Q. Does calm mean no appreciable wind?

A. No appreciable wind, yes, sir.

Q. How was the visibility?

A. Very good.

(Testimony of Earle B. Vaux.)

Q. Will you——

The Court: Where was the boat going, Mr. Wood?

Mr. Wood: Q. Where was the boat bound for?

A. Bound for Astoria.

Q. And from there? A. From Portland.

Q. What?

A. Astoria; she was bound to Astoria from Portland.

Q. And then from Astoria where was she going?

A. Bound north to Puget Sound, that is, Seattle and Tacoma and various ports on Puget Sound.

The Court: Q. When were you due in Astoria?

A. Six hours from the time we left Portland; I mean that morning at eight o'clock the gangs——

Q. They had been ordered for eight o'clock?

A. Yes, sir, at Astoria. [471]

Mr. Wood: Q. Was the ship then in the inter-coastal trade?

A. She was in the intercoastal trade, yes, sir.

Q. By the way, is there any certainty nowadays in the movements of these vessels?

A. Not nowadays, no, sir.

Q. Where do you expect to go to next?

A. The Red Sea.

Q. The Red Sea? Where is McPhee, who was Chief Officer on this ship, right now?

A. Due to the fact that he lives in Gloucester, he has to be transferred to a North Atlantic ship and he was transferred to a North Atlantic ship.

(Testimony of Earle B. Vaux.)

Just where he is now, I don't know. He is Chief Mate of one of the company's vessels that was running to the North Atlantic service.

Q. The reason I asked you, I thought you told me he was on his way to the Red Sea.

A. I couldn't be positive of that.

The Court: Q. Do you know whether it is any hotter in the Red Sea than it has been here?

A. I doubt it, your Honor.

Mr. Wood: Q. Now, Captain Vaux, who was on the bridge on the night of this collision?

A. Pilot John Norberg and Mr. Nelson, the Third Mate, and the helmsman, Meagher.

Q. And yourself? [472]

A. And myself, yes, sir.

Q. Did you have a lookout forward?

A. Yes, sir, there was a lookout forward.

Q. A seaman? A. I beg your pardon.

Q. A seaman posted forward?

A. A seaman, yes, sir.

Q. And who was conning the ship?

A. Pilot Norberg.

Q. Were you taking an active supervisory part in the navigation?

A. Yes, sir; that is my duty.

Q. The Master, in spite of a pilot being aboard, always remains in supreme command, does he not?

The Court: How long had he been a Master, Mr. Wood?

Mr. Wood: Q. How long had you held Master's papers? A. Ten years.

(Testimony of Earle B. Vaux.)

Q. How long had you had the *Pennsylvanian*?

A. One year, sir.

The Court: Q. You might have the papers without having a ship, might you not? How long had you had a ship as a Master?

A. A year.

Q. The *Pennsylvania* was your first ship as a Master?

A. No, the *Kansan* was my first ship.

Q. But you have had ships as a Master for one year? A. Yes, sir. [473]

Mr. Wood: Q. You mean one year before the collision?

A. No, nearly a year on the *Kansan* and it figured about six months on the *Pennsylvanian* at the time, figuring a year and a half on total capacity as a Master.

The Court: Q. Until the accident?

A. Yes, sir.

Mr. Wood: Q. Is it expected of you to know the beacons and navigation lights, all those things, and be intimately familiar with them all up and down this river? A. No, sir, it is not.

Q. I asked you that, because when I am about to ask you about the collision, the place in the channel, and so forth, I don't know whether you know those lights or the names of them sufficiently to identify the position of your ship with relation to the lights or not—do you? A. No, sir, I don't.

Q. Will you please—and you can refer to your

(Testimony of Earle B. Vaux.)

log book, bell book, if you want to—tell the story of the Pennsylvanian's departure from Portland down to the time of the collision? Here are these books, if you want to look at them.

A. Thank you. The Pennsylvanian was due to sail from Portland to Astoria at midnight, and she left on time, nearly on time. She left at 12:03 from Portland; various moving bells, swung around and headed downstream, passed through the railroad bridge and St. John Bridge and at Terminal 4, I believe it is, the city [474] limits, she was clear of the city limits and at that time which I refer to—the time in the bell book here is 12:50—the engines were put full ahead.

Q. Full ahead?

A. I will check back on that, sir.

Mr. Young: May I interrupt with a question, your Honor? I would like to inquire as to whose handwriting that book is in?

A. Well, perhaps I might ask if it is correct that I ask Mr. Nelson if it is his handwriting, which I believe it is.

Q. You are not sure yourself?

A. It is not my handwriting.

Q. It is not yours? A. No, sir.

Mr. Wood: I will ask a question about that. That is the official bridge bell book kept on your ship, is it not? A. It is the official——

Q. And it is the duty of the Third Officer, who is on the bridge, to keep it, is it not?

(Testimony of Earle B. Vaux.)

A. Whoever is on watch, Mr. Wood.

Q. And on this occasion, is was Nelson, was it not? A. It was Nelson, yes, sir.

Q. And the book is kept under your supervision as a part of a ship's regular duty and routine, is it not? A. It is, sir.

Q. That is all. [475]

A. At 12:50 the engines were put full ahead and at that time I did see what later turned out to be the Barry "K". At that time that I did see the Barry "K" I was standing in the wheelhouse just close to the threshold in the door on the port side and then upon sighting the lights that turned out to be the Barry "K" towing, I stepped out onto the bridge for the purpose of listening for signals.

The Court: Did you use the word "towing" there?

A. I did use the word "towing," yes, sir.

Mr. Wood: Is your Honor familiar with the construction of the bridge?

The Court: I have heard some here and then I have heard some in other cases.

Mr. Wood: Q. Perhaps I will have Captain Vaux just describe how the bridge is constructed, particularly what part of it is enclosed in glass and what part of it is open.

A. Well, if you had a piece of chalk, Mr. Wood, I would try and show it on the blackboard.

Q. I will give you something that you can make more permanent. Draw it on this piece of paper.

(Testimony of Earle B. Vaux.)

Mr. Young: Do you have any photographs, Mr. Wood, of the Pennsylvanian?

Mr. Wood: No, I haven't.

A. This represents looking down on the bridge, your Honor. This is what is known as the bridge; it is the wheelhouse, this [476] being the port side and this the starboard side, this representing windows in the forward end for vision; this is the wheel, the steering wheel of the helmsman and quartermaster, and this here being the chart room where the charts are kept and your——

The Court: Q. That little dot to the left there marks the door into the chart room?

A. This is the door here, yes, sir. that door is closed.

Q. And those two circles on each side are side lights? A. Side lights, yes.

Q. Are there doors out to the right and to the left from the wheelhouse?

A. There is a section across here with a sliding door which is kept open and also here a section of a sliding door which is kept open; in other words, so that we can walk from one end of the bridge to the other.

Q. Which are the open wings of the bridge?

A. This is the open wing of the bridge here and an open wing of the bridge on this side.

Q. You say it has windows; that implies it is closed. What do you mean by that?

A. Windows are in the wheelhouse only. There are no windows in the wing of the bridge itself.

(Testimony of Earle B. Vaux.)

There is a railing here that can be readily seen; it is, I should judge, four and a half feet height.

Mr. Young: I think the record is quite unintelligible as to [477] this particular diagram and I would like to request that the witness mark on the diagram the names of the various places he has just been testifying to and then have the diagram marked as an exhibit.

The Court: That can be done.

Mr. Wood: That is all right. I will mark it by agreement with you.

Mr. Young: Very well.

Mr. Wood: Suppose we call this port wing of bridge.

Mr. Young: What does the Captain say about that?

Mr. Wood: Well, that is what he said.

The Witness: I swear it is the port wing.

Mr. Wood: Mark this the starboard wing.

The Witness: Starboard wing.

Mr. Wood: Mark this the steering wheel.

The Witness: Wheel, yes.

Mr. Wood: Q. Mark this—what do you call it, the pilot house or enclosed part of bridge, or what—

A. It is the wheelhouse.

Q. That is enclosed? A. It is enclosed.

Q. Except that you have got windows that you can open and doors on each side. A. Yes.

Q. Wheelhouse. [478]

The Court: Q. Which are left open, he said; sliding doors which he said are left open.

(Testimony of Earle B. Vaux.)

Mr. Wood: Q. Is this where the door is, here somewhere?

A. No, the doors open up here, this section here.

Q. And the same up there? A. Yes, sir.

Q. Right there "door"? A. Yes.

Mr. Young: Q. Were those doors open the night of the accident? A. Yes, sir.

Mr. Wood: Q. Now, the wings of the bridge are open and the wheelhouse is enclosed, is that right? A. Yes, sir.

Q. This is the chart room, the rear?

A. That is the chart room. I could elaborate on that and bring the wings down but it is not necessary.

Mr. Wood: I think that is enough. Bring them out, you say?

A. The wings running down here on the side, but it is not necessary.

Mr. Wood: I offer that as Claimant's Exhibit, Vaux, 1.

The Court: Admitted.

(The drawing, so offered, was received in evidence as Claimant's Exhibit 10.)



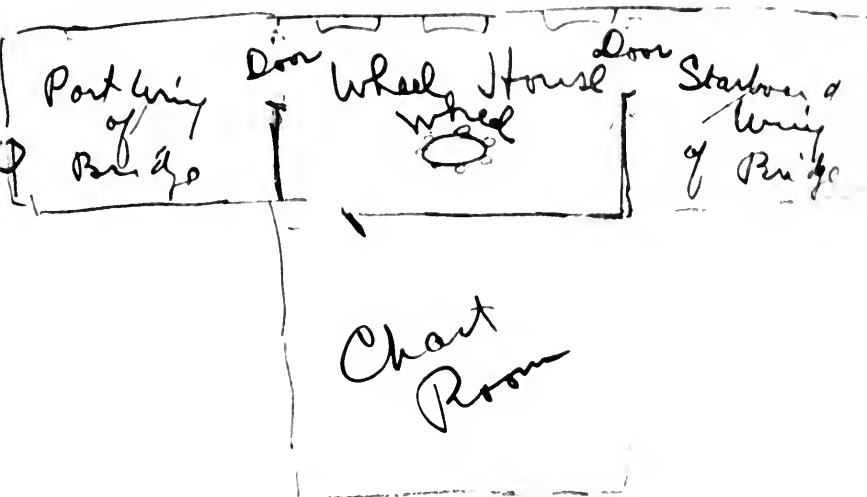
U. S. DISTRICT COURT
DISTRICT OF OREGON
F. L. E. V.

JUL 23 1941

G. H. Marsh, Clerk

DEPUTY

Claimants
EXHIBIT 10 Med
Cir. No. 722
OSCAR TAYLOR Reporter



No. 1
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

NOV 30 1942

PAUL P. O'BRIEN
CLERK

(Testimony of Earle B. Vaux.)

Mr. Wood: Q. I am sorry to interrupt your narrative, Captain, but I thought we ought to clarify that. Will you go on now and tell what happened from the time you stepped out onto the wing [479] to be prepared to hear any whistle signals from the Barry "K".

A. At 12:50 the engines were full ahead. I did see the lights of a vessel towing that later turned out to be the Barry "K", that is, the two white lights of towing, that is, a red side light, which did bear approximately a quarter of a point on the port bow. About a minute later I heard one whistle and pilot Norberg remarked, he said, "One blast," and I says, "Yes, one blast," and shortly after the Pennsylvanian answered with one blast.

Q. Who blew the one blast from the Pennsylvanian? Who pulled the whistle cord, if you remember?

A. I can't be sure of that. I didn't blow the whistle, Mr. Wood. I believe it was pilot Norberg. I didn't hear any orders passed from Norberg to Nelson to do the whistling.

Q. How did that one blast from the Barry "K" sound; I mean was it distinct or confused, was it a plain one blast or was it something that you could have been mixed up about, or what was it?

A. There is no doubt in my mind whatsoever that it was clear and unmistakable and distinct as one blast.

Q. Well, then, your ship answered with one blast and then what happened?

(Testimony of Earle B. Vaux.)

A. Answered with one blast.

The Court: I will have to interrupt you again. Under the regulations and practice is one blast the same length as each of two blasts? [480]

Mr. Wood: I believe that the two-blast signals are two short blasts of the whistle and a short blast, I think, is supposed to be a second's duration, isn't it, Captain?

A. The regulations call for a short blast as of about a second's duration; a long blast four to six seconds.

The Court: Q. Four to six?

A. A long one is four to six; a short blast is one second.

Q. And you testified that this was definitely a long blast of four to six seconds?

A. No, sir, a short blast.

Q. You would say it was a short blast? I am not trying to make you say that it was two blasts but I am trying to get at the length. It wasn't like the usual one long blast? A. No, sir.

Mr. Wood: All right. There was a single blast?

A. Yes.

Q. Which you answered with one blast?

A. Answered with one blast.

Q. And then what was the course of your ship from then on; what was done?

A. The vessel was swinging off the Post Office range at that time. I knew it was Post Office range only by being informed that it was that particular

(Testimony of Earle B. Vaux.)

range, but being as it was, range lights, the name didn't mean anything to me. I knew it was ranges. The vessel was to the right of the ranges and favoring the right-hand [481] side and she was swinging off range. About a minute later, after the one blast from the Pennsylvanian answering, what turned out to be the Barry "K" showed a green side light.

Q. Up to that time she had been showing her red light?

A. Up to that time she had been showing her red light and even at that time there was nothing to be alarmed about. She might have taken a sheer at that time, temporarily out of control, that I didn't know and I don't know.

Q. Why do you say there was nothing to be alarmed about; are you referring to the distance away she was or what?

A. Yes, the risk of collision can be ascertained by carefully watching the compass bearing of the approaching vessel and if the bearing doesn't appreciably change, such risk of collision should be deemed to exist. At this particular point she was two points on the port bow and she had started to show her——

Q. You said when you first saw her you thought she was about a quarter of a point on your port bow. Now you say she was about two points on your port bow and I wish you would explain what would bring about that change.

A. Well, as I testified, the Pennsylvanian was

(Testimony of Earle B. Vaux.)

going off the range and to the right and as she went to the right it would open up that angle on the bow.

Q. Yes.

A. In other words, as the Pennsylvanian came down this channel here, making this gradual curve, the approaching vessel would, [482] because of the Pennsylvanian's curve, appear more on the Pennsylvanian's port bow.

Q. Well, then when you saw the green lights, did it raise any doubt in your mind as to the other vessel's course or intention?

A. I supposed that she had taken a sheer; that is the only thing that entered my mind at that time.

Q. What did you suppose she was going to do then?

A. I expected she would right herself and continue on her own side of the channel.

Q. Are those momentary or temporary sheers common things in navigation?

A. Yes, they are on every vessel, for the helmsman or whatever it happens to be that causes it.

Q. Could you give us an estimate of how far away she was when she first showed you a green light?

A. I wouldn't attempt to estimate her distance away at the actual time she started showing her green light, no, sir.

Q. Well, up to the time she showed her green light, had she blown you any danger signals?

(Testimony of Earle B. Vaux.)

A. No, sir.

Q. Was it after she had shown her green light for an appreciable length of time that you got the first danger blast?

A. I should judge it was about a minute, Mr. Wood, that the green light was visible, that she did sound a danger signal.

Q. What is your recollection of those danger signals? You heard [483] the Court ask Norberg whether they were in distinct groups or whether they were more or less all consecutive and jumbled up.

A. A danger signal consists of four or more short and rapid blasts and rapid blasts mean just as fast as a man can pull a whistle.

Q. I know—— A. It is an alarm.

Q. I know. I don't think you got my question. Were the danger signals from the Barry "K" a series of blasts and then an appreciable stop and silence, followed by a second group of blasts and the same thing and then a third distinct group of blasts or were they, as you remember it, not so divided into groups?

A. Well, I recall it as one distinct danger signal; then an appreciable period later; that is, just almost instantaneously before the actual impact; that is the only two that I recall of hearing, sir.

Q. Well, shortly before the impact you reversed full speed astern, did you not?

A. Yes, sir, shortly before the impact.

(Testimony of Earle B. Vaux.)

Q. And what signal did you give, if any, to indicate that fact?

A. The three whistles of the Pennsylvanian to indicate that her engines were running full speed astern.

Q. That is the statutory signal, is it not?

A. Yes, sir.

Q. And did the Barry "K" blow a similar signal, three blasts?

A. I don't recall of hearing those three blasts. [484]

Q. All right. Let's get back to the first danger signal you heard from the Barry "K" after she had shown her green light. When you received that danger signal, what did you do on your ship?

A. I didn't do anything.

Q. I don't mean you yourself; I mean what was done on your ship?

A. The first danger signal the engines had been put to slow and stop previous to that after the green light was visible and when the danger signal came through, it was understood as a danger signal, the engines were put full speed astern. I place that time in reference to the bell book, if they want the exact times.

Q. That is when the green light first appeared, you went half speed?

A. Half speed and then stop, one bell following upon the other. In the bridge bell book the times are kept to the nearest minute. Fractions of min-

(Testimony of Earle B. Vaux.)

utes are not logged in the bridge bell book; the engine room bell book they are.

Q. Is it your recollection that you put her at half speed and stop as soon as you saw this green light or an appreciable time afterwards?

A. Very shortly after, almost instantly but very shortly after.

Q. And then later you heard the danger signal and then you—what did you do then?

A. After the danger signal?

Q. Yes.

A. The engines were put full speed astern. [485]

Q. Well, when you put your engines full speed astern, do you know what your helm order was?

A. Immediately it was hard right.

Q. What effect did that rudder and the reversing have on your ship?

A. The natural tendency of a vessel going full speed astern will put her stern right to port and the bow will swing rapidly to the right and with a hard right rudder that force increases so that she does swing very rapidly at that particular order and condition.

Q. Did that happen at this time?

A. It did, sir.

Q. How close would you say you were to the right-hand side bank of the river at the time of the collision?

A. I couldn't judge that distance. It was at nighttime that it happened. I could not judge, but

(Testimony of Earle B. Vaux.)

I still wonder why the Pennsylvanian didn't go ashore, because the trees were visible there of the shoreline.

Q. Well, at the time did you have any apprehension that you were so close that you might go ashore, at the time of the collision?

A. At the time of the collision?

Q. Yes. A. Yes, sir, I did.

Q. You did not, however, ground, did you?

A. Not to my knowledge, she didn't. It would be astem, if it [486] was anything.

Q. Is it customary or a practice to keep a man on the forecastle head ready to drop anchors when you are going down the Willamette and Columbia rivers after you leave the city of Portland?

A. No, not after the city limits. The Chief Officer is dismissed from the forecastle head. Only a lookout is left there.

Q. Was the Chief Officer on duty at the time of the collision or prior thereto?

A. Just prior: he had just left the forecastle head after he was dismissed from the bridge after we left the city docks.

Q. You mean he was dismissed by you from the bridge but he was on the forecastle head?

A. He was on the forecastle head, yes, sir.

Q. That was sometime before the collision?

A. It is fixed as approximately five minutes.

Q. You said a seaman was on the lookout. Do

(Testimony of Earle B. Vaux.)

you recall whether he reported the lights of the Barry "K"?

A. I believe that one bell was struck or whatever it was. I don't know. I couldn't say.

Q. Well, his routine duty would be to strike a bell to indicate a vessel ahead? A. Yes.

Q. One side or the other?

A. True. [487]

Q. It is not the duty of the lookouts, however, in clear weather to report whistle signals, is it? A. In a fog, yes, sir.

Q. I said in clear weather. A. No, sir.

Q. Now, to get back to this whistle of one blast that you heard from the Barry "K", did you say that was shorter than the usual long blast that is given by ships?

A. It was one blast of the whistle, termed as one blast. It wasn't shorter than a short blast, no, sir.

Q. It wasn't what?

A. It wasn't shorter than a short blast.

Q. No, it wasn't shorter than a short blast, but was it—I thought you said it was shorter than the usual long blast.

A. As I recall it, it was shorter than the usual long blast.

Q. Now, that is what I wanted to get at. Was there anything about that shortness which gave any rise to any doubt or misunderstanding in your mind about the other vessel's course or intention?

(Testimony of Earle B. Vaux.)

A. No, sir.

The Court: I suppose this would be a convenient time, Mr. Wood, to adjourn before you go to another subject. We have just a few minutes left, or do you want to——

Mr. Wood: I just want to ask him something else.

The Court: While we are waiting, Mr. Young, give me again [488] the whistles that you claim were made, slowly.

Mr. Young: I have a chart of them, your Honor, that I will be glad to supply.

The Court: I don't want the chart.

Mr. Young: I mean I can give you them exactly as the evidence shows.

The Court: Don't you have it in mind?

Mr. Young: I don't want to make any mistake on them, because there are a number of them.

The Court: I don't want your chart; I want what you think the evidence shows to date according to your theory.

Mr. Young: The evidence to date, according to our theory, shows that the first whistle blown by the Barry "K" was two blasts of the whistle for a starboard to starboard passage, and that was answered by one blast from the Pennsylvanian, which is a port to port passage whistle——

The Court: You don't need to explain them; just give the orders.

Mr. Young: Next the Barry "K" sounded four

(Testimony of Earle B. Vaux.)

blasts; no answer; another four blasts—another two blasts from the Barry “K” and no answer; then four blasts from the Barry “K”; no answer; two blasts from the Barry “K”; next the Pennsylvanian sounded three blasts and finally the Barry “K” sounded three blasts.

The Court: All right; thank you. [489]

Mr. Wood: Q. Captain, I was a little confused by these whistles myself and my associate called my attention to the pilot rules on it.

The Court: You claim that the Barry “K” gave three starboard passing whistles and two danger signals?

Mr. Young: No, three starboard passing whistles, your Honor, and three danger whistles.

The Court: That isn’t the way you just called it.

Mr. Young: I beg your pardon; four danger signals.

The Court: That isn’t the way you just called it to me.

Mr. Young: Just a moment.

The Court: I think you will find the record, when you read it, is rather tangled about the whistles; that is why I am bringing it up now before the adjournment. The way you have just called it to me is two by the Barry “Q” answered by one.

Mr. Young: Yes.

The Court: Then four, two, and four, and two—no, going back to the first four again; four, two and four unanswered.

(Testimony of Earle B. Vaux.)

Mr. Young: Four, two—that is correct.

The Court: Then two answered by three.

Mr. Young: Right.

The Court: Then three by the Barry “K”?

Mr. Young: Right.

The Court: That is three starboard passing whistles and two danger whistles. That is two—it is two 4’s; that is a full [490] house.

Mr. Young: May I take time out for a moment?

The Court: No, don’t take it. I think you had better look over the whistle record during the week-end.

Mr. Young: There are a number of whistles blown; it is a little confusing.

Mr. Wood: Q. Captain Vaux, I think I understand your testimony, perhaps, but I am not sure it is clear. I want to clarify it. On page 18 of the Pilot Rules it defines short and prolonged blast, doesn’t it? A. Yes, sir.

Q. And it says a short blast of the whistle shall mean a blast of about one second’s duration?

A. Yes, sir.

Q. A prolonged blast of the whistle shall mean a blast of from four to six seconds’ duration?

A. Yes, sir.

Q. Now, the prolonged blast of a whistle is the fog signal, is it not? A. Yes, sir.

Q. That is on page 21, rule 12, is it not?

A. Yes, sir.

Q. That is in fog, a steam vessel under way

(Testimony of Earle B. Vaux.)

shall sound at intervals not more than a minute a prolonged blast? A. Yes, sir. [491]

Q. We have nothing to do with that. Now, what is the signal according to the rules when a vessel is going to pass port to port in a narrow channel?

A. Sound one blast of the whistle, meaning directing her course to starboard.

Q. And it is a short blast, is it not?

A. A short blast, termed as a blast.

The Court: Q. Termed the same as what?

A. Termed as a blast.

Mr. Wood: In other words, a single blast here for a port to port passage, if blown by the Barry "K", would have been a short blast, not a prolonged blast?

A. Yes, sir, it would have been a short blast and not a prolonged blast.

Q. And it was a short blast, a single short blast, that you heard, was it? A. Yes, sir, it was.

Mr. Wood: I think that is clear now. The rules I referred to, your Honor, are Rule IV, "When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other, and either vessel shall give, as a signal of her intention one short and distinct blast of her whistle": that is for a port to port passage. The preliminary rule says the same. One short blast of the whistle signifies intention to direct course to own starboard. [492]

The Court: The ordinary listener would think

(Testimony of Earle B. Vaux.)

that the one blast for passing was longer than two for a starboard passing, just ordinary experience, it seems to me.

Mr. Wood: I take it, apparently, from the rules they are not. The one blast, according to the rules, is about of a second's duration for a port to port passage and for a starboard passage it is two blasts, each blast of a second's duration; is that right?

A. Yes, sir.

Mr. Wood: Do you want to adjourn now, your Honor?

The Court: If it is agreeable. You will have considerable more examination?

Mr. Wood: Yes.

The Court: Well, we had just as well adjourn now until Monday morning. Some of you may find it inconvenient to be here as early as we have been starting. We will start at nine o'clock.

(Whereupon at 11 o'clock A.M., an adjournment was taken to 9 o'clock A.M., Monday, July 21, 1941.) [493]

Monday, July 21, 1941, at 9 o'clock A.M., pursuant to adjournment, the following further proceedings were had:

Mr. Wood: If your Honor please, we are in a little bit of a dilemma about these pilots. One of the American-Hawaiian ships has to go down the river at ten o'clock this morning and the pilot can be back tomorrow morning and I think we will have

other testimony to consume the intervening time, but I would like to excuse one of these pilots now and let him take the ship down and be back here tomorrow morning.

Mr. Young: No objection.

The Court: All right.

Mr. Wood: Captain Norberg will take the ship down and be back tomorrow morning.

The Court: I think we will start early again in the morning, to make sure we can get through tomorrow.

Mr. Wood: I am willing to start as early as your Honor pleases, but I can't guarantee we will finish tomorrow.

The Court: What was your last remark?

Mr. Wood: I am willing to start as soon as your Honor pleases, but I can't guarantee we will finish tomorrow.

The Court: Well, it is all the more so then.

Mr. Young: May it please the Court, at the close of the session on Friday, your Honor was making inquiry as to what Captain Reed's testimony had been with respect to the number of [494] whistles, and I gave to your Honor the detail of what I understood his testimony to be about those whistles. Since that time I have checked that against the transcript of the testimony of Captain Reed and find it to be accurate. In other words, Captain Reed testified to three starboard passing whistles and to two danger whistles. And also to one full speed astern whistle. In addition, your Honor,

opposing counsel was inquiring for the pilot house log of the Barry "K" for January 31, 1941. I now have the log here and counsel is welcome to use it. This covers both the 31st of January, 1941, and February 1, 1941.

Mr. Wood: Captain Vaux was on the stand. I suppose he had better resume.

EARLE B. VAUX

resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Wood: I may be going over some of this a second time.

Q. Captain Vaux, after you heard the single short blast from the Barry "K", then you answered with one blast; at that time you said that the red light of the Barry "K" was showing to you?

A. Yes, sir.

Q. And I have forgotten where she bore off your bow; I think you said about dead ahead, but I am not sure. What was it?

A. At the time we picked up the Barry "K", she was approximately half a point on the port bow.

Q. By "picked up," you mean first sighted her, first saw her? [495]

A. Yes, sir.

Q. Well, then, with the exchange of whistles, did that position change materially?

A. It did change, yes, sir. She was farther on the port bow.

(Testimony of Earle B. Vaux.)

Q. Then when she swung and showed her green light to you, approximately how far apart were the vessels at that time, would you estimate?

A. At least a quarter of a mile, I should judge.

Q. Now, what did you do with the engines of your ship when that green light appeared?

A. The pilot ordered the engines to half speed and then stop, one bell following upon the other.

Q. Well, one bell following upon the other might mean immediately or it might mean with an interval between; which do you mean?

A. A slight interval between.

Q. How much of an interval?

A. A fraction of a minute.

Q. Yes. Now, you have already testified that when that green light first appeared, the vessels were far enough away that you regarded it as safe for her to swing——

The Court: Mr. Wood, pardon me. I suppose some mechanical considerations enter into the time within which they may follow a half speed with a stop?

Mr. Wood: Oh, yes.

The Court: I suppose what he means is that they stopped the [496] engines as quickly as they could.

Mr. Wood: Q. Is that what you mean, Captain? What do you mean when you say half speed and then stop? The Court wants to know whether that means you stopped as quickly as you could or what do you mean?

(Testimony of Earle B. Vaux.)

A. Yes, we stopped as quick as she could. On the telegraphs, your Honor, when they are rung to a slow or to a stop, whatever the bells may be, that telegraph is answered from the engine room and the order is carried out almost instantaneously.

The Court: Q. That isn't what I want light on. A certain situation develops and calls for stopping the engines in the judgment of the pilot; does he stop them or must he first reduce them to half speed?

A. He can stop them immediately, sir.

Mr. Wood: Q. Now, you have already testified, Captain, that when the green light of the Barry "K" first appeared, you thought it was just some temporary sheer of the vessel and that the ships were far apart, so you thought it was all safe, and she could resume her course; do you remember testifying to that? A. Yes, sir, I do.

Q. Now, if that is what you thought, why did you half speed and stop?

A. The idea in meeting a vessel is to slow down and in this particular instance it was to give her a chance to right herself without involving a situation that would call for drastic action. [497]

Q. Had you up to that time of your stopping your engines received any danger signal from the Barry "K"? A. No, sir.

Q. Well, when did you receive a danger signal from the Barry "K", the first one?

A. The first one. She had been showing green

(Testimony of Earle B. Vaux.)

for approximately a minute when the first danger signal sounded and at that time the Pennsylvanian's engines were stopped and when it was understood to be a danger signal, the engines were put full astern at that time and a hard right rudder was ordered at the same time.

Q. You say when you received the first danger signal the engines of the Pennsylvanian had already been stopped? A. Yes, sir.

Q. You are referring to this stop order that you have just been testifying to?

A. That is the one, yes.

Q. In other words, they continued stopped from that stop order until you reversed full speed astern, did they? A. Yes, sir.

Q. You said that you reversed full speed astern when the danger signal from the Barry "K" was understood to be a danger signal. There wasn't any doubt about its being a danger signal, was there?

A. There was no doubt whatsoever that it was a danger signal. [498]

Q. In other words, when you got that first danger signal, did you reverse your ship at once?

A. Yes, sir.

Q. What was the effect on the Pennsylvanian of that reversing full speed astern and hard right rudder?

A. The reversing of the engines alone has a tendency to throw the stern to port. In other words, the term you use, she backs to port, and when she

(Testimony of Earle B. Vaux.)

backs to port the bow swings to starboard and a hard right rudder with that condition she will swing very rapidly.

Q. How long a time would you estimate it to be from the time that you reversed your engines until the collision? A. A fraction of a minute.

The Court: Q. What would have happened——

A. (Continuing) Less than a minute.

The Court: What would have happened if he had put the rudder the other way? Would it have neutralized the natural——

Mr. Wood: Q. What would have happened if you had put the rudder the other way?

A. We would have gone right through the Barry "K", right amidships, I figured. She could have not broken her swing. She was swinging to starboard, with her engines going full astern; she would have a tendency to swing to the right herself, but she could never swing to port; she would have gone right through the Barry "K".

Q. You mean if you had put the rudder —— [499]

The Court: Q. It wouldn't do any more than straighten her up; is that what you mean?

A. I do not mean she could have been straightened up in that time.

Q. You do not believe?

A. I do not believe that she could.

Mr. Wood: Did you make an official report to the Inspectors of this collision?

(Testimony of Earle B. Vaux.)

A. Yes, sir, I did.

Q. Do you have it with you?

A. Yes, sir, I believe it is in my coat pocket.

Q. May I see it?

The Witness: May I get that? (Speaking to the Court.)

Mr. Wood: Q. You said just now that the interval of time between reversing full speed astern and striking was a fraction of a minute. That might mean fifty seconds or it might mean fifty-nine seconds. Can you be any closer than that?

A. Less than a minute. I should judge it would be closer to forty-five seconds than it would be to ten seconds.

Q. When you reversed full speed astern, did you give the required whistle signal to indicate that?

A. Yes, sir, it was three whistles, three blasts given to indicate the engines were running full speed astern.

Q. Did you hear the Barry "K's" three blasts?

A. I am not positive whether she blew or she didn't. I couldn't say. I don't recall hearing them. She might have. I didn't pay [500] any attention to it at that particular time.

Q. Was the Barry "K" blowing a good many whistles during this last interval of time just before the collision?

A. It seemed to me, yes, sir, the second danger signal was the one that remains more sharply in my mind, that it was almost instantly before the impact itself. She was very, very close aboard.

(Testimony of Earle B. Vaux.)

Q. You have navigated many harbors and rivers and entrances all over the Atlantic and Pacific coasts, have you not? A. Yes, sir.

Q. Have you been to other parts of the world or just the United States?

A. Yes, sir, on the oriental run.

Q. What is your opinion as to whether or not in this Post Office Bar channel, with the width of approximately 800 feet, thirty feet deep, say 700 feet wide, thirty-five feet deep, as to whether or not it is safe and practicable for this tug and tow, as she was made up, and your ship to have passed there port to port?

A. I consider it perfectly safe and practicable for that to happen.

Q. Safe and practicable for your ship alone or for both ships?

A. Both of them, sir. I see no hazard involved in keeping their own side of the channel.

Q. What can you say as to the advantages of this rule to pass to [501] the right in giving pilots a reliance on the certainty of what the other ship is going to do? What can you say about that?

A. I don't believe I fully understood your question.

Q. What advantages does Article XXV give in being certain and definite so that you know what the other ship is going to do, especially at night-time in a channel?

A. Well, if vessels did not keep to their own

(Testimony of Earle B. Vaux.)

right side of the channel, you wouldn't know what they were going to do, if they didn't follow the pilot rules. It would be a question of doubt each and every time that you met anybody there.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain, as a matter of fact, though, in any particular narrow channel, isn't it true that there are local practices which from time to time vary and that you as the pilot are required to give cognizance to those local practices?

A. Yes, and if the practice is known generally by a written report of the customs of that particular place, yes, sir.

Q. As a matter of fact, one reason why you use special pilots in operating in these narrow rivers is that those special pilots are more familiar with local conditions than you as the Master of the ship would be; isn't that true?

A. If that particular—Yes; yes, sir, that is true, but the captain of the ship is notified of these local rules as well as [502] the pilot. They are posted; they are known.

Q. Well, to what extent have you made it your business to become familiar with any local practices that may exist on the Willamette or Columbia rivers which are peculiar to those rivers as distinguished from other rivers?

A. I don't recall anything unusual, sir.

Q. Pardon?

(Testimony of Earle B. Vaux.)

A. I don't recall anything unusual.

Q. You don't recall anything unusual?

A. No, sir, I don't.

Q. Did you ever make any check to determine whether there are any practices with regard to river boats making starboard to starboard passages anywhere between Portland and the mouth of the Columbia River?

A. I never had the occasion, no, sir.

Q. You never had occasion to? A. No, sir.

Q. You yourself have never actually piloted an ocean-going ship down the Columbia River nor through the Columbia, have you?

A. I have no license for that, no pilot license.

Q. That is one reason why Captain Norberg was the one piloting the ship at that time; isn't that true?

A. Or any river pilot, yes, sir.

Q. Or any river pilot, yes.

A. Yes, sir. [503]

Q. You testified, I believe, that you have had about a year to a year and a half's experience as a Master; is that correct?

A. Up to the time of the accident, yes, a year and a half.

Q. And during that period of time, how frequently would you say you have been in the Willamette River?

A. Twice; every two months and five days. That is about a scheduled run. That would be about the figures.

(Testimony of Earle B. Vaux.)

Q. And when your ship was proceeding through the Willamette River, were you always on the bridge?

A. Yes, sir, I was always on the bridge.

Q. Prior to the time that you became a Master, had you had occasion to travel over the Columbia and Willamette Rivers in any other capacity than Master?

A. Yes, sir.

Q. What was that capacity?

A. Chief Officer, nine years.

Q. For nine years. Then you have quite frequently been up the Willamette while a Chief Officer?

A. Yes, sir.

Q. During that period did you have occasion to familiarize yourself with the various peculiarities of the channel in the Willamette River from Portland, let us say, to the Columbia?

A. Not particularly, no, sir.

Q. Not particularly. You have testified, Captain, that when you first saw the Barry "K", you saw her red light; is that correct? [504]

A. That is correct.

Q. Which meant to you, I take it, that you were looking at her port side?

A. Yes, sir.

Q. Now, at the place where you saw that red light, do you recall that on the east side of the river there is a big long sweeping bend?

A. Yes, sir.

Q. Do you know what your geographical direction was at the time that you saw that red light?

(Testimony of Earle B. Vaux.)

A. I am not familiar with the courses in the river, Mr. Young.

Q. Well, you testified, I think, that you were just coming off Post Office range?

A. Yes, sir.

Q. Does not Post Office range tend over toward the west side of the river?

A. I have not—I have no pilotage for the Columbia River; I couldn't under oath swear that it did or it didn't.

Q. In any event on your east side of the river at the time that you saw this red light, you do remember there was a bend there, don't you?

A. Yes, sir. Pardon me, Mr. Young; may I have that chart for reference?

Q. I will be glad to have you step down to the chart. Just step down to the chart, Captain, to Libellant's Exhibit 2. Now, you [505] observe in examining this chart there is a long curve of the river; is that correct? A. Yes, sir.

Q. And you see the line here which indicates Post Office range? A. Yes.

Q. Now, as I understand, you were just coming off that range when you saw the light of the Barry "K"? A. Yes, sir.

Q. Now, could you indicate on this diagram about where you think you were when you saw the light of the Barry "K"?

A. Yes, I could indicate about where we saw it.

Q. Just indicate, if you please.

(Testimony of Earle B. Vaux.)

A. The blue line there is a close approximation.

Q. The blue line; you are referring to the blue cross?

A. Yes, the blue cross; it is a close approximation, yes, sir.

Q. Would you think that the blue cross that I am now pointing to would be a close approximation of the position of the Barry "K"?

A. I don't know. Whether she was east side or the west side, I couldn't say.

Q. Well, Captain, in any event it was obvious to you, wasn't it, that a boat coming upstream, as the Barry "K" was, you would naturally see the red light first, wouldn't you, from your position when you first observed it, because of the existence of this long curve in the river; isn't that true?

A. Yes, I believe you could see the red light first and her towing [506] lights.

Q. When you first saw the Barry "K" then and saw this red light, there was nothing about that that was surprising, was there?

The Court: The Captain had better come back to his chair.

A. We would expect to see a red light. That is true. But I should judge she could be showing the green side light, if she was hugging the bank up there at nighttime.

Q. Well, at least it wasn't surprising to see the red light of the Barry "K", because of the existence of that curve in the stream; isn't that true?

(Testimony of Earle B. Vaux.)

A. Not because of the curve of the stream, no, sir; you would expect to see a red light on the wrong side of the channel.

Q. You would what?

A. You would expect to see a red light on the wrong side of the channel.

Q. But I am asking you, even though with the Barry "K" on the east side of the stream, in view of the fact of that bend in the stream, you would necessarily have to see the red light first from the position you were in in going off Post Office Bar; is that not correct?

A. No, I don't believe it is. I think you could see her green side light if, when the Pennsylvanian was coming off the range, she was hugging that side closer to her in the position and the angle she was in, I do believe that you could see a green side light. [507]

Q. As a matter of fact, wasn't the Barry "K" in a position where, but for the bend in the river, if she kept on going straight ahead, she would be crossing your bow from your right to your left?

A. Will you please repeat that?

(The last question was read by the reporter.)

A. If she was showing a red light, she would, yes, sir; she would be crossing the bow.

Q. Now, as your ship came nearer to the Barry "K" and she came nearer to you, if she were following the thread of the stream, she would tend then to swing around more into the position where

(Testimony of Earle B. Vaux.)

you would at some stage for the first time see the green light; isn't that true?

The Court: What do you mean, thread of the stream?

Mr. Young: Well, following—I mean the course of the stream——

The Court: Following the bend?

Mr. Young: Yes, following the bend.

The Court: You will have to restate it. Take that word “thread” out of it.

Mr. Young: I will do that.

Q. Is it not true, Captain, that as the Barry “K” would be coming upstream following the bend, you would naturally expect a little later then to see the green light?

A. Which bend, Mr. Young?

Q. The only bend that we are talking about, the bend in the [508] river which the Barry “K” was proceeding around at the time that you first saw her; is not this a bend to which I am pointing?

A. The way your pointer is, I don't know whether it is the inside bend or the outside bend.

Q. The Barry “K” was, you said, in the position as indicated by this blue cross mark to which I am now pointing; is that right? A. Yes.

Mr. Wood: He didn't say that; he said he couldn't say.

Mr. Young: Q. Did I understand that you did or did not agree that you thought the Barry “K's” position was substantially where that blue cross mark puts it or not?

(Testimony of Earle B. Vaux.)

A. I told you I couldn't judge.

Q. Irrespective of which side of the stream the Barry "K" was on, in view of the fact she was rounding this bend, coming toward you, wouldn't it be true that you would first see her red light normally and then a little later see her green light?

A. I don't believe so, no, sir.

Q. Well, why not?

A. If she was hugging close in on the wrong side of the channel, it would be the green light.

Q. Captain, as you get down into the bite of this curve, the channel tends to straighten out a bit, doesn't it?

A. I had no pilotage, Mr. Young.

Q. I am asking you to look at the map, though, if you will, please. [509]

A. Yes, sir.

Q. And as the ship in following the curve and straightening out at that particular point—it would tend to be coming more head-on and head towards you, wouldn't it?

A. No, it wouldn't.

Q. It would not?

A. I shouldn't think so.

Q. Perhaps you don't understand my question, Captain. Let me go back just a moment. Assuming that the Barry "K" were in the position approximately where that blue cross mark is——

A. Yes, sir.

Q. ——and you were approximately in the position where the other blue cross mark is just coming off Post Office range——

A. Yes.

Q. ——and your general direction at that time

(Testimony of Earle B. Vaux.)

tends toward the left or bottom side of this map and the Barry "K's" general direction tends to the same place on an angle, an oblique angle, doesn't it?

A. We wouldn't be tending to the left, Mr. Young; we would be swinging and tending to the right.

Q. You were swinging and tending to go to the right? A. Yes.

Q. But for a time while you were on Post Office range you were tending toward the left so far as the course of the stream is concerned; isn't that right? [510]

A. We were leaving Post Office range.

Q. You were leaving Post Office range. As the Barry "K" is coming upstream, whether she is on the east or on the west side of that stream, isn't it true that she first tends to show her port side to you and then as she gets farther upstream, because of the curve she tends to swing around so you can see her starboard side; isn't that true?

A. No, sir, I shouldn't judge that it was.

Q. What is the answer?

A. I don't believe it is.

Q. You don't believe it is. You testified that when you first saw the green light of the Barry "K", you thought she had taken a sheer?

A. Yes, sir.

Q. What does the word "sheer" mean?

A. To be temporarily out of control.

(Testimony of Earle B. Vaux.)

Q. What causes a ship to take a sheer?

A. Various things.

Q. For instance. A. Steering.

Q. Steering?

A. Yes, sir. Putting the wheel one way and then letting her take ahead too rapidly and trying to get her back or put her wheel hard the other way; she will have a tendency to sheer.

Q. Was there anything at that particular place to suggest to you [511] the Barry "K" should be getting out of control?

A. I didn't know what she had; I mean I couldn't judge.

Q. You said, however, that although you thought she might be taking a sheer, which you now say means getting out of control, you saw no reason to be alarmed? A. No, not at all.

Q. How did you know at that time how long it would be before the Barry "K" would recover from this sheer?

A. Well, in other cases of vessels taking a sheer, they right themselves in a very reasonable length of time.

Q. What do you mean by reasonable length of time?

A. Well, in this particular case the Barry "K" and the Pennsylvanian were both, I should judge, in safe position. I mean there wasn't any danger, nothing to become alarmed about. If she did take a sheer, that could be controlled and no doubt I expect that she would be controlled.

(Testimony of Earle B. Vaux.)

Q. However, this sheer which you testified to meant she was going across your bow, didn't it?

A. No.

Q. It did not?

A. It meant that the vessel had swung off her course.

Q. Well, at least while she had swung off her course, her direction was across your bow, wasn't it?

A. Her head would be pointing that way, yes, sir.

Q. That is what I mean. [512] A. True.

Q. And geographically that meant that her head was tending to point toward the east shore at that point of time; is that right? A. Yes, sir.

Q. Well, if the head continued to remain in that position, that was a matter of interest to you in the piloting of the ship, wasn't it?

A. Yes, that is why the engines were put at half speed and stop, Mr. Young.

Q. What I don't understand, however, was your statement that there was no occasion to be at all alarmed. A. True.

Q. When you thought the Barry "K" was out of control. A. True.

Q. If she didn't get out of this sheer, however, there would be something for you to be alarmed about, wouldn't there? A. Yes, sir.

Q. What were all of the lights that you observed on the Barry "K" when you first saw her?

A. When I first saw her?

(Testimony of Earle B. Vaux.)

Q. Yes.

A. The two white towing lights and her red side light and brilliant white deck lights.

Q. What did those two white towing lights mean to you? A. That it was a vessel towing. [513]

Q. What sort of a tow?

A. Towing alongside.

Q. Towing alongside? A. Yes, sir.

Q. You knew that she did not have a log raft behind then, didn't you?

A. Yes, sir, I knew that.

Q. Now, you mentioned that you saw white deck lights? A. Yes, sir.

Q. Were they quite brilliant?

A. They were very brilliant, Mr. Young.

Q. When you say deck lights, what do you mean?

A. Lights about the deck, passageways; I am not familiar with the Barry "K" or her actual construction, but I term deck lights—as deck lights, lights about the deck used on the overhead generally or on the bulkheads, that reflect.

Q. How many of these lights did you see?

A. They couldn't be counted. I mean one doesn't count lights. It is more of a glare from a series of lights.

Q. In other words, there was a whole series of white lights that you saw; is that correct?

A. Deck lights, yes, sir.

Q. You were not able to distinguish separate lights on the deck?

(Testimony of Earle B. Vaux.)

A. I couldn't and wouldn't.

Q. How high did those lights appear to be above the level of the [514] water?

A. I couldn't judge.

Q. Did those lights remain on continuously down until the time of the accident?

A. Well, I didn't pay particular attention to her bright deck lights at the time of the impact or collision.

Q. During all of the time that you were watching her, however, did you notice whether those lights were continuously on?

A. I didn't take particular notice after I had convinced myself that she was a tow boat.

Q. Did those lights assist you or not in determining the position of the Barry "K"?

A. No.

Q. Did not?

A. They did not assist. I am still speaking of deck lights, now, Mr. Young.

Q. I understand; the deck lights, yes. At the time that you thought the Barry "K" was taking a sheer, did you mention that to the pilot?

A. I don't recall any reconversation due to the fact that the telegraphs were rung and I was standing outside at the time. I could see the telegraphs and knew what was going on.

Q. When you heard the first danger signal from the Barry "K", did you understand any reason why there should be a danger signal?

(Testimony of Earle B. Vaux.)

A. I didn't, no, unless he had broken down or something had [515] happened.

Q. You couldn't interpret the signal except that it was a danger signal?

A. As a danger signal, yes, sir.

Q. What is the maximum speed which the Pennsylvanian can attain?

A. Well, I don't know whether you are speaking of light draft, half loaded or full draft or what she is.

Q. Well, suppose her loaded as she was at the time of this accident, what would be her maximum speed?

A. I believe she could work herself to twelve knots, yes.

Q. Twelve knots? A. Yes.

Q. And at the time that you first were coming off the Post Office range, what would you say her speed was?

A. I couldn't judge what her speed was, Mr. Young.

Q. Do you know what the maximum speed she attained was at any time before the collision occurred?

A. The maximum speed that she attained before any bells were rung on the——

Q. Yes.

A. I believe I could approximate close to it; I couldn't swear to that speed.

Q. What would you approximate then?

(Testimony of Earle B. Vaux.)

A. I believe she had worked up to seven and a half or eight knots. [516]

Q. And at the time that the vessel was put full speed astern, what would you say her speed then was?

A. Well, the engines were half speed and then stopped and put full speed astern, sir.

Q. When the engines were put half speed, that cut down her speed somewhat, didn't it?

A. Yes, sir.

Q. How much was the speed reduced by putting the engines at half speed before you put them full speed astern?

A. Well, due to the fact that she had not attained her full speed, it would be very hard to judge just exactly what her speed was and how much it was reduced after the engines were put at half speed and stopped.

Q. Well, you don't know then?

A. I couldn't swear, no, sir.

Q. And you wouldn't undertake to say what her speed was at the time that you put the engines full speed astern?

A. I should judge it would be four knots.

Q. Four knots?

A. Between four and four and a half knots. That is a close approximation, I believe.

Q. And what would you say was the distance between the Barry "K" and the Pennsylvanian at that point of time?

A. I could not judge.

(Testimony of Earle B. Vaux.)

Q. How fast would you say the Pennsylvanian was traveling at the [517] time the collision occurred? A. The actual impact?

Q. Yes.

A. I should judge three and a half or four knots.

Q. Three and a half—

A. Between three and a half and four. That is the best I can do. It is a close approximation.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. I would like to ask some questions I overlooked asking. On this matter of lights that Mr. Young was asking you about, you said you saw the deck lights of the Barry "K's" house?

A. Yes, sir.

Q. Did you see prior to the collision any lanterns on the barges? A. No, sir, I did not.

Q. After the collision, did you see any lanterns on the barges?

A. After the actual impact and when I ordered the searchlight turned on, I did, yes, sir, but I wasn't looking for lights; I will guarantee you that. I was looking for survivors. We found there was no survivors; there was nobody aboard the barges and I sang out to the tug Cruiser, which had arrived on the scene approximately fifteen minutes after the actual impact, if there was anybody aboard there or if he was all right and he claimed there was nobody aboard and he was all

(Testimony of Earle B. Vaux.)

right, he would take care [518] of him. And I did put the search light on the barges and drew to the attention of the Third Mate who at that time was standing alongside there—I was handling the search light myself—and the pilot, to note closely at that time a lantern that was on the barge 22.

Q. Where was the lantern?

A. The lantern was on the deck of the barge, which later proved to be closest to the stem of the Barry "K". There was a street construction lantern, the same thing as you see on a sign when it says "Detour," that type of lantern.

Q. It wasn't, then, this type of lantern?

A. No, sir, it was not that type of lantern. It was a tall—I think, if I recall the name correctly, it is Dietz, is the name they go under, for Dietz Construction.

Q. Was it hanging up on the corner of the house of the barge?

A. It was absolutely not hanging on the corner; it was sitting on the deck, sir.

Q. About how high above the water?

A. I don't know how high the Barry "K"—the barge 22 was above the water, but it was on the deck.

Q. Was it bright or dim?

A. No, sir, it was dim. I didn't pick it up until I put the searchlight on it. Incidentally, the searchlight on the Pennsylvanian is a new Sperry type search light, which is very powerful. It can sharpen things out a good deal. [519]

(Testimony of Earle B. Vaux.)

Q. Do you know whether this lantern was burning or not; could you tell that?

A. It appeared to be burning.

Q. How far away were you from her at that time?

A. The collision had taken place; the Pennsylvanian was on a backing bell, and the Pennsylvanian had left the barge 22, the actual running into the barge herself, she had got herself clear from that, I should judge it must have been all of 150 feet.

Q. From where you were to the lantern?

A. Yes, sir.

Q. Could you tell—I don't know whether you could or not—at that distance and that light whether the lantern was smudged or dirty or not?

A. I couldn't say. It certainly wasn't sparkling bright.

Q. Did you see any other lanterns on the barges?

A. I saw no other lanterns, Mr. Wood.

Q. Will you please explain to the Court what the purpose of a vessel's range lights are?

A. The range lights—you are speaking of a steam vessel?

Q. Yes.

A. Range lights of a steam vessel are used to designate her course, her angle, that she is either open or closed. In other words, if the range lights are directly in line and the green and red side lights were showing, you would know that the vessel was coming directly towards you, and if the

(Testimony of Earle B. Vaux.)

lower range [520] or the mast headlight was open, you knew that there would be an angle between that and that the vessel would probably—would clear; you would know the angle that she was heading at, the course. The after range is fifteen feet higher than the mast head light.

Q. Should be according to the regulations?

A. It should be.

Q. Do those range lights on a vessel enable the opposing navigator to tell the angle of that vessel's approach better than if he just saw the side light of the approaching vessel?

A. Yes, sir, very much.

Q. Why is that?

A. That the range lights——

Q. Why do the range lights enable the opposing navigator to tell the other vessel's approach with more accuracy than if he just saw the red light alone?

A. Well, he would determine what it was. With range lights he would know it was an ocean-going steamer and if the range lights were open, he would know the course she was on.

Q. The range lights aren't confined to ocean-going steamers, are they?

A. No, they are not confined to ocean-going steamers. You can readily tell, probably, by the height of the lights whether she was an ocean-going steamer or not.

Q. Were the helm orders on the Pennsylvanian promptly and [521] correctly obeyed?

(Testimony of Earle B. Vaux.)

A. Yes, sir, they were. I can see from where I am standing outside on the wing of the bridge—there is what we call an indicator arrow aft and that, too, can be seen, which way the helm is put, whether it is amidships or hard over to one way or another. And if I am inside, I can see it.

Q. You could also tell from the vessel's movements whether she was doing what you wanted her to?

A. You could tell by her head what she was doing.

Q. Were the engine room orders obeyed promptly and correctly?

A. Yes, sir, they were. The telegraph was rung and answered.

Q. The vessel maneuvered then in accordance with the orders given on the bridge?

A. She did, yes, sir.

Q. Did you have a lookout stationed?

A. Yes, there was a seaman on the forecastle head as lookout.

Q. Is either that lookout or the helmsman with the ship now?

A. No, sir, they are not. Seamen very rarely stay more than half a trip, at least a full trip, nowadays. They are always changing from ship to ship and company to company.

Q. I forgot to ask you this: When the Barry "K" blew her one blast, did or did not pilot Norberg confirm that by asking you what you heard or did you speak to him about it?

(Testimony of Earle B. Vaux.)

A. I heard the blast and directly after pilot Norberg remarked, "One blast," and I confirmed and I did agree that it was one [522] blast. It is a custom for the pilot to make those remarks. I mean if it was one blast, he would say, "One blast," and either the Captain of the ship and the officer on watch, either would agree or would not agree as to what they heard.

Q. That is what I was going to ask you, whether that is the regular practice or not?

A. It is on American-Hawaiian ships, yes, sir, the same as it is for the Captain to be there all the time going up and down this river, or any river, or any harbor, to be on the bridge at all times.

Q. Was there any doubt in your own mind about what this blast was from the Barry "K"?

A. Never at any time.

Q. This official report of yours is a copy only, is it not?

A. That is a carbon copy, yes.

Q. It is a true copy, though, is it not, of your report; it is a correct copy?

A. Yes, I typed it.

Mr. Wood: I am going to offer it in evidence, your Honor, merely as a consecutive narrative of his present testimony.

Mr. Young: The document is objected to, your Honor, upon the ground that it is purely self-serving and is not admissible in favor of the party offering it.

(Testimony of Earle B. Vaux.)

The Court: I will reserve the ruling.

(The report, so offered, was marked Respondent's [523] Exhibit 11 for identification.)

RESPONDENT'S EXHIBIT No. 11
FOR IDENTIFICATION

WLCB

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department

Cable and Radio

Address

Amhawaii

M. S.

S. S. Pennsylvanian Voy.

87 W. B.

Written at Portland, Oregon.

Date February 1, 1941.

Subject, Collision.

Bureau of Marine Inspection & Navigation
Captain Arthur Joachims, Local Inspector,
Portland, Oregon.

Dear Sir:

I regret to report a collision between Western Transportation Barge #22, being towed by tugboat 'Barry K' at 12:55 A.M. this day Feb. 1, 1941 at Post Office Lower Light in the Willamette River. The Pennsylvanian was considerably damaged about the bows and I understand the barge and her cargo is also damaged. There were no personal injuries

(Testimony of Earle B. Vaux.)

and both my vessel and the barge were able to reach this port and are now here.

The Pennsylvanian Capt. Earle B. Vaux, Master and Pilot John Norberg left Pier 'A' Portland at 12:03 A.M. this day bound for Astoria. Weather overcast—visibility good—calm and smooth, tide ebbing. Vessel proceeded down river passing through R.R. Bridge at slow speed. At 12:39 engine at half speed passing under St. Johns Bridge. At 12:50 A.M. Full ahead sighted a towboat approximately half a point on port bow showing regulation towing lights (white) and red side light with brilliant deck lights. About a minute later the towboat blew one blast on her whistle, which was understood by Pilot Norberg and by me to be a passing signal and that he (the towboat) was passing 'port to port'. This vessel answered with one blast, and continued down stream well on her right-hand side of the channel. As we approached closer, the 'Barry K', which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed. The bridge bell-book entry for this is at 12:54 A.M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger sig-

(Testimony of Earle B. Vaux.)

nal, and we immediately put our engines full astern and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern. This is recorded in our bell-book at 12:55 A.M., which, again, is only to the nearest minute. After a short period going with engines full astern and rudder hard right, we collided with Barge #22 of the Western Transportation Company. Though the collision is recorded

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department

Cable and Radio

Address

Amhawaii

M. S.

S. S. Pennsylvanian Voy.

87 W. B.

Written at Portland, Oregon.

Date February 1, 1941.

Subject, Collision.

Bureau of Marine Inspection & Navigation

Captain Arthur Joachims, Local Inspector.

#2.

in the bridge bell-book, to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable.

Called through megaphone to tugboat asking if

(Testimony of Earle B. Vaux.)

he was all right or needed assistance. He answered he had a broken oil-line. At about 1.10 A.M. tug-boat Cruiser bound up river went to the Barry K and then came alongside to pick up the two barges that were drifting. Asked Cruiser if he needed any assistance and if anyone aboard barges, to which he replied, 'No'.

Bilges and fore peak tank showed no change and at 1:23 A.M. proceeded toward Astoria. At 1.52 A.M. repeated soundings showed that vessel was making water in the forepeak tank (used for fresh water). Stop-turned around and proceeded to return to Portland and began pumping from fore peak. Vessel docked Portland 4.10 A.M. this day.

In my own statement and firm belief the towboat Barry K. and her tow of two barges failed to keep her right side of channel after blowing one blast; also tow improperly and inadequately lighted.

Respectfully submitted,

E. B. VAUX,

Master

S. S. Pennsylvanian.

I concur in the foregoing statement.

Pilot.

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: Q. Captain, from the time you saw the Barry "K" and heard her blast and answered

(Testimony of Earle B. Vaux.)

it, were you giving your attention from that time on to the approaching ship and observing her movements? A. Yes, sir, I was.

Q. Now, there has been a great deal of testimony here why a tow boat shouldn't come up on the right-hand side. I will ask you why an ocean-going steamer going down the river should not go down on the left-hand side in that place?

A. It would be a direct violation of pilot rules. There is a number of reasons.

Q. What are some of them?

A. If the vessel is keeping to the left and hugging that particular bank and the tide was ebbing, the current was ebbing, if anything went wrong with the Pennsylvanian she would go ashore, she would go aground. If it was necessary to reverse her engines at any time, her stern would back to port, which would throw her stern up into the bank——

The Court: Q. Bow, wouldn't it be?

A. No, she would back to port if she was on the left-hand side of the channel, running down, her stern would back to port if it was necessary to back the engines, your Honor.

Mr. Wood: Q. How would that throw her head——

A. It would throw her head directly across the channel to the [524] right.

Q. Suppose she was going to the left and an upcoming ship was coming up on that ship's left,

(Testimony of Earle B. Vaux.)

in other words, a starboard to starboard passage, and the Pennsylvanian had to suddenly back, what effect would that throwing her head to the right have on increasing the risk of collision?

A. Well, there is no doubt there would be a collision right then and there, because you are blocking the channel as the vessel is coming up and the current is running down, it is settling you down any way.

Q. Is it easier to handle a ship against the current or going with the current?

A. It is easier to handle against the current. It doesn't have the effect on the stern.

Q. Are there any other reasons? You said there were several reasons. You have already given several, but are there any more?

A. I can't think of any, sir.

Q. Now, some mention was made by Mr. Young in earlier testimony about dropping anchors. What have you to say about that? I will ask you first whether it is the practice or customary to keep an officer on the forecastle head for the purpose of dropping anchors in clear weather, going down the Columbia River after you have left the city limits, or Willamette or Columbia Rivers?

A. Never.

Q. Is there any occasion for doing that? [525]

A. No. In case of thick weather—and they have quite a bit of it around here; fog—you do keep a man there for that purpose, because you do get

(Testimony of Earle B. Vaux.)

an anchor down to wait until weather clears, but for meeting ships and for that reason, never, no, you don't keep anybody there after the city docks.

Q. Suppose you did go down there in that channel, say at seven knots, and you had to drop your anchor, what would be the effect—not if you had to drop your anchor, or if you did drop your anchor, what would be the effect?

A. She wouldn't fetch up.

Q. What would she do?

A. She would just keep going and sheer; that is what she would do. She would never fetch up and stop.

Mr. Wood: I think that is all. If anything later on occurs to me, I will ask leave to recall him.

Recross Examination

By Mr. Young:

Q. Captain, how many anchors do you have on the forward part of the *Pennsylvanian*?

A. Three.

Q. And where are they located?

A. Port bow, starboard bow, spare.

Q. Who is it that drops those anchors under orders from the bridge?

A. A licensed deck officer or anybody would drop them; the [526] lookout would drop them.

Q. Do you have anybody on the *Pennsylvanian* whose particular job it is to handle the anchors?

A. The Chief Officer is in charge of the running of the—

(Testimony of Earle B. Vaux.)

Q. But can any other member of the crew drop those anchors if there is occasion to do so?

A. Do they or can they?

Q. Are they permitted to do that?

A. Under orders they do it.

Q. Where was the chief officer at the time of this accident?

A. In his room. He had just left the forecastle head, after we had left the city docks.

Q. When you say the city docks which docks do you mean?

A. I understand the city docks to be Terminal 4.

Q. Terminal No. 4? A. Yes.

Q. Just below St. Johns?

A. That is the term I use, that I am familiar with.

Q. Had the Chief Officer been on the forecastle head until you got down to terminal No. 4?

A. Yes, Mr. Young.

Q. Why was he there?

A. Passing through the bridge mostly.

Q. Did he have any duties in connection with the anchors in going down through the harbor?

[527]

A. They are always ready and standing by in case of an accident, of failure of engines and vessels backing out of a dock and——

Q. In other words, in case of any emergency occurring, until you got down to Terminal No. 4 the Chief Officer was there to drop the anchors if there was occasion to; is that right?

(Testimony of Earle B. Vaux.)

A. It is a practice, yes, to have them standing by.

Q. I say, suppose that some danger had arisen farther upstream, above Terminal No. 4, rather than below Terminal No. 4, and the Chief Officer were on the forecastle head, if you ordered him to drop the anchors he would drop them, wouldn't he?

A. If we wanted them dropped, yes, or the carpenter might drop them.

Q. However, from Terminal No. 4 on down stream there was nobody on the forecastle head that could have dropped the anchors even if you wanted them dropped; isn't that right? A. No.

Q. What? A. No, it isn't right.

Q. Who was there?

A. There was a lookout there that could drop the anchor if he was told to.

Q. Had the lookout ever dropped the anchors?

A. I never questioned him, Mr. Young, if he had ever dropped an anchor or not. It doesn't take a great deal of ingenuity to open up a compressor and let an anchor drop. A man doesn't have [528] to be so well versed and educated in order to open a compressor to drop an anchor.

Q. Exactly what was the rating of this lookout? A. Seaman.

Q. He was a seaman? A. Yes.

Q. Was he an ordinary seaman?

A. Yes, sir.

Q. Isn't it true that the job of dropping the

(Testimony of Earle B. Vaux.)

anchor ordinarily is done by either the carpenter or by the Chief Officer?

A. There are a great many things that are done that are not ordinary in case of emergency, Mr. Young. Yes, that is true.

Q. The general practice is that?

A. The general practice.

Q. Why is it that you select those two officers to be the ones, or the carpenter and the Chief Officer, to be the ones who normally will drop the anchor?

A. The Chief Officer is on day work and the other officers stand watches, and it isn't good practice or a good idea to ask a man that has been standing a watch and been working cargo to go up and stand by; in other words, the Chief Officer is on in the daytime and he sleeps all night, and the other officers, they stand their watches and the carpenter also works on daytime.

Q. What were the duties of this lookout to whom you referred?

A. The regular duties of a lookout. [529]

Q. Well, what are they? The Court probably doesn't know.

The Court: Yes, I do; it just happens that I do.

Mr. Young: Q. Well, I would like to know more about them myself, for the record. Will you tell us, please, just what the duties of a lookout are? You say to maintain a lookout?

A. Yes.

(Testimony of Earle B. Vaux.)

Q. Anything else? A. Yes.

Q. What?

A. Carry out the orders of the bridge or a licensed officer.

Q. Do you know how long that particular lookout had been with your ship before the accident?

A. Well, no; changing men all the time, Mr. Young, I can't remember those things. I have a crew of forty men; I can't keep track of the time when they go and when they arrive. I could tell you by referring to my books and so forth, but actually carrying those figures in my head, no.

Q. The lookout was the only one on the fore-castle head at the time of the accident, wasn't he?

A. Yes, on the fore-castle head. There is a stand-by man also on that watch.

Q. Where was he located at the time of the accident?

A. He is close by the bridge; in other words, so that the bridge officer blows a whistle, that is a pee whistle, a small whistle, and the lookout stand-by will answer that and find out what [530] the officer wants.

Q. So far as you knew, if you had ordered that lookout to drop the anchor do you know whether he knew how to drop it or not?

A. Will you please repeat that?

(The last question was read by the reporter.)

A. I would assume he did, but I couldn't swear

(Testimony of Earle B. Vaux.)

under oath that he would know how to carry out his orders.

Q. Well, no one gave any order to the lookout to drop the anchor, did he?

A. It wasn't necessary at any time.

Q. You have testified that if you were traveling, say, at about seven miles an hour, that dropping the anchor would not in any way retard the speed of the vessel.

A. You would probably lose your anchor.

Q. Probably lose it?

A. You would probably lose it, yes; when you fetch up on cold steel at that weight, you are not going to do much holding; she is on the snap.

Q. Well, now, when you drop the anchor, you can control the speed at which it drops, can't you?

A. No.

Q. You cannot?

A. You can if you are hooked up on a windlass and you back her out slowly; she will pay out very slowly, but that is a matter of minutes and minutes to get it down. [531]

Q. Are any of those anchors on your forecastle head hooked up to a windlass?

A. Two of them are, yes; they are hooked up when you hook them up.

Q. You have to hook them up first?

A. You have to hook them up first.

Q. In times of emergency you would hesitate

(Testimony of Earle B. Vaux.)

on taking a chance on losing an anchor rather than having a collision, wouldn't you.

A. No, you would just let go.

Q. You would let go? A. Yes.

Q. I ask you, if you did let go, wouldn't you expect that that anchor would to some degree retard the forward movement of the vessel?

A. Not at close quarters, no, sir.

Q. Well, in what distance, going at seven miles an hour, would you think it would be required before the anchor would commence to take effect?

A. I never dropped an anchor at seven knots. I wouldn't know. I wouldn't attempt to do it, unless an emergency arose, and then I would find out only by experience.

Q. Well, it is your understanding that the anchor was dropped—or rather that the order of full speed astern was given when you were traveling probably seven knots at the time of this accident? [532]

A. Approximately, I should judge, it was between six and seven. I couldn't judge.

Q. There were two different speeds and I wasn't sure which you intended to say. I am inquiring now as to the speed of the *Pennsylvanian* at the time the order was given full speed astern?

A. I couldn't judge with any accuracy on that speed.

Q. You couldn't?

A. No, sir. I know it wasn't full speed. I know she hadn't attained full speed.

(Testimony of Earle B. Vaux.)

Q. I understand. The purpose, however, of dropping an anchor under circumstances of that sort would be to let it drag on the bottom of the river; wouldn't that be true?

A. Sometimes they drag and sometimes they fetch up all of a sudden. It is according to your bottom, whether it is sticky, whether it is clay, whether it is hard, whether it is rocky, or whatever it is. Each place is a different condition.

Q. What do you have an anchor on a vessel at all for? A. To anchor her.

Q. And never when she is in motion?

A. Yes, sir. Oh, yes. Bending, warping around a dock, an anchor is used. She might have a little headway on at the time, the anchor is put down to swing her, to make her stern move one way or another, according to the particular anchor you use. Also, of course, for anchoring in thick weather, and so forth.

Q. Have you ever dropped an anchor when your ship was traveling [533] seven miles an hour?

A. I have not.

Q. Never have? A. No, sir.

Q. You know, as a matter of fact, it is frequently done in emergencies, don't you?

A. I have heard of it and I have heard also of the vessels coming up without any anchor on them afterwards; you just lose it.

Q. If it happened to prevent a collision, that would be all right, wouldn't it?

A. Yes, if it was necessary.

(Testimony of Earle B. Vaux.)

Q. Now, Captain, you have testified that from your experience on the river, it would be your opinion that it would be perfectly safe for river boats to use the west side of the river, and make a port to port passage; is that correct?

A. I am sorry; I didn't follow that. It is a long question.

(The last question was read by the reporter.)

A. Judging from steamships, yes sir.

Q. That is what I mean, judging from steamships; did you ever operate a river boat on the Willamette River?

A. No, sir, I never did.

Q. Have you ever operated river boats anywhere? A. Never.

Q. Well, then, do you know about the various problems that face men in the operation of their river boats from any personal [534] experience?

A. I have learned quite a few in this courtroom, Mr. Young, but I don't know, no, sir.

Q. Unfortunately this knowledge you didn't have prior to the accident, did you? A. No.

Q. Do I understand that your information on that subject is confined to what you have learned here in the courtroom?

A. The handling of river boats?

Q. The handling of river boats.

A. And tows?

Q. Yes. A. Mostly.

Q. Mostly. I see. So that when you gave your answer with regard to the matter of it being per-

(Testimony of Earle B. Vaux.)

fectly safe for the river boat to pass port to port, you were basing that upon your knowledge of the operation and piloting of ocean-going ships?

A. No.

Q. Not? A. No.

Q. What was it based on then?

A. It was based not on what I heard in this courtroom, but more what I have actually experienced in going down and passing port to port, by seeing others doing it and following out the law.

Q. Had you ever prior to this accident ever had occasion to [535] meet a river boat in the vicinity of Post Office Bar? A. Yes, sir.

Q. How frequently?

A. Well, I couldn't judge that. I have met them there at that particular bend.

Q. You have not at that particular bend?

A. I have met them at that particular bend.

Q. Oh, you have at that particular bend?

A. Yes, sir.

Q. Daytime or night?

A. Daytime mostly.

Q. Were these river boats traveling light or what did they have with them? A. Barges.

Q. Which side of the stream were they using?

A. On the port to port, they were on their own side.

Q. Is that the only time you have ever passed river boats at that particular place, port to port?

A. No.

(Testimony of Earle B. Vaux.)

Q. Have you passed them starboard to starboard at that particular place?

A. Yes. A log raft; I don't recall passing a barge there. I did pass a log raft there; I distinctly remember that.

Q. You have a distinct remembrance of that?

A. Yes, he had quite a long raft with him. [536]

Q. At that time you did not make a port to port passage, did you?

A. It was daytime; no, sir. He had a long raft with him and he was hugging the shore.

Q. Do you remember on that occasion which one whistled first, whether it was you or the tug boat?

A. I don't recall.

Q. You did not insist on your right to pass to the right of the other vessel at that time, then?

A. Conditions didn't permit it.

Q. What conditions didn't permit it?

A. The actual conditions that it was daylight, it was obviously and it could be seen that he was hugging and having quite a time on the left-hand side of the channel. A strong wind was blowing. A strong wind, natural conditions, that he was more or less in difficulty himself. He had all he could do to hug that side.

Q. Which way was the wind blowing that time?

A. I don't recall the way it was blowing, Mr. Young.

Q. By the way, what was the name of the lookout that was on the Pennsylvanian's forecastle head; was it Swearingen?

(Testimony of Earle B. Vaux.)

A. That is correct; it was Swearingen.

Q. Will he be here at this trial?

A. I don't know where he was; I believe the union took him off. They have a great deal of control.

Mr. Wood: I will say that he will not be here at this trial, [537] and I will add that he is not in the employ of the company. I wired to the company in San Francisco and requested that they find him and send him here, if they could, and they wired back that they didn't know where he was, that he had left their employ. There is no question, as I view it, at least, your Honor, of the lookout, but if my statement that he is unavailable needs corroboration by any testimony, I will ask leave to supply it. I don't think there is a lookout question in the case, myself.

Mr. Young: If the Court please, there is no charge made that there was no lookout on board the Pennsylvanian, but the question as to what that lookout saw is very important in this case, which is the reason that I have asked this question, to find out where that lookout is.

Mr. Wood: Furthermore, I will offer to allow counsel to use in this trial the testimony of that lookout given before the Steamboat Inspectors.

Mr. Young: Do I understand it is not going to be possible for you to produce that lookout?

Mr. Wood: It is not, no.

Mr. Young: I will accept the offer, your Honor,

(Testimony of Earle B. Vaux.)

to use the testimony of that particular lookout. I understand, however, that in so doing it is understood this lookout is a witness for the Pennsylvanian.

Mr. Wood: Oh, no, I didn't say that. I said if you wish to use his testimony, I am willing to let you. [538]

Mr. Young: Will you permit me to use a part of that testimony?

Mr. Wood: Well, no, of course not.

Mr. Young: And you can use any part you wish to clarify it.

Mr. Wood: It is very short; I think if you want to use it, you should use it all.

Mr. Young: I will check the testimony, your Honor, and we will take up this matter later.

Q. Captain, as I understand the reason why you got out the search light following the accident was to find out whether there was anyone aboard the barges that had been injured?

A. I wouldn't know they were barges; I hadn't seen them, in fact. I didn't know whether there were people living aboard there or being aboard there at the time, or not. And I was anxious to find out, to pick men up, if anybody had been injured. That was the idea of the use of the search light.

Q. Who gave the order for the search light to be used? A. I did.

Q. So you were interested in finding out

(Testimony of Earle B. Vaux.)

whether there was anyone there that had been injured and that is why you got out the search light?

A. That is true.

Mr. Young: I think that is all.

Redirect Examination

By Mr. Wood: [539]

Q. Captain, after the collision was all over, did you hear the testimony of the Captain of the tug Cruiser that when you went down the river with the Pennsylvanian, you passed between one of the barges and the west bank, in other words, you passed——

A. Yes, sir.

Q. ——the barge on your own starboard side?

A. Yes, sir.

Q. Is that correct or not?

A. Both barges were on our starboard hand when we went downriver, yes; the tug Cruiser had arrived on the scene fifteen minutes afterwards and after I had used a megaphone to find out if there was anybody aboard the barges or if he needed any assistance, he had replied in the negative.

Q. At that time the barges were on the east side of the river, were they?

A. Yes, sir.

The Court: Mr. Wood, where did the Pennsylvanian drydock for repairs required by this collision?

Mr. Wood: Q. Where did she, Captain?

A. Portland Drydock.

The Court: Q. Portland?

(Testimony of Earle B. Vaux.)

A. Had to wait there.

Q. She came back here?

Mr. Wood: Q. Did she come back here then?

A. She went—we started down-river after the collision; I [540] didn't believe the Pennsylvanian was damaged at the time. I took soundings and she was making no water whatsoever, but upon making headway through the water, which we later proved and found out, she started to fill and the vessel was turned around and returned to Portland.

The Court: Q. How far down the river did she turn around?

A. I don't know just the—under way for between half and three-quarters of an hour, she started to fill.

Q. Then you turned around?

A. Yes, sir, when the soundings showed that she was filling.

Q. What time did you get back to Portland?

A. I would have to refer to the log book for that.

Q. About what time?

A. About two o'clock.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.) [541]

OSCAR NELSON,

produced as a witness in behalf of the Respondents,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Nelson, where do you reside?

A. Jacksonville, Florida.

Q. And you are employed by the American-Hawaiian Steamship Company, aren't you?

A. Yes, sir.

Q. And you are Third Mate on the steamship Pennsylvanian, are you?

A. I am Fourth Mate right now, or Junior Third.

Q. Fourth Mate or Junior Third. What were you on her at the time of her collision with the Barry "K"?

A. Third Mate.

Q. Third Mate. And where were you on the ship at the time of that collision?

A. On the bridge.

Q. And what duties were you performing on the bridge?

A. Assisting the pilot in keeping the lookout and tending to the telegraph and watching the helmsman and any other duties that were required by the Master or the pilot. I assisted both of them.

Q. You said watching the helmsman. Watching him for what purpose?

A. To see that the pilot's orders were carried out.

Q. That is one of the regular duties of a Third

(Testimony of Oscar Nelson.)

Mate, assisting [542] in the navigation of the ship, is it not? A. Yes, sir.

Q. When you gave the orders on the telegraph, did you make any notation of them?

A. I noted the orders in the bell book, the time and the bells.

Q. Did you note them in the bell book itself or, on the scraps of paper and later copy them in the bell book? A. In the bell book.

Q. At the very time? I thought you told me you noted them on scraps of paper first and then put them in the bell book a little while later.

A. No, that was after the collision; I took some of the bells on paper.

Q. In making those entries in the bell book, as long as you are on that subject, describe how exactly you note the time, whether you note it to seconds or minutes or what?

A. To the nearest minute.

Q. That is, suppose you made an entry at 12, let's say, 52, something having happened then, that could be as late as 12:52 and 25 seconds; is that what you mean?

A. 12:52 and 25 or anything up to 30 seconds would be 52.

The Court: Speaking of minutes, Mr. Wood, two vessels sighting each other about a mile apart, as these did, going at the speed that they were going and doing the things they did meanwhile, about how much time elapsed? [543]

Mr. Wood: I will have to do a little calculation

(Testimony of Oscar Nelson.)

on that, your Honor. I wouldn't answer it off-hand. Well, if they were going each six miles an hour, let us say, it would be closing the gap between them at the rate of twelve miles an hour. Can you answer that for me?

Mr. Vaux: If a vessel will make a mile every five minutes, making twelve knots an hour, the two vessels approaching would just cut that distance in two, to two and a half minutes. The mile would be closed in that time.

Mr. Wood: If they were going twelve knots an hour, but in this case, let's assume they were going six knots for an easy calculation.

Mr. Vaux: Sir?

Mr. Wood: The Barry "K" says she was going six knots and you said you had attained a speed of seven and then cut it down. For a rough calculation, if they were each going six knots and kept on going six knots, they would close a mile gap in five minutes.

The Court: These events transpired, roughly, we may say, in a period of five minutes.

Mr. Wood: You mean from the time they first saw each other?

The Court: Yes.

Mr. Wood: I would think so possibly. That is largely guesswork on my own part.

The Court: It is rather important, though. [544]

Mr. Young: If the Court please, might I call attention to the fact that the testimony of the pilot

(Testimony of Oscar Nelson.)

Norberg was that the Pennsylvanian had reduced its speed to about one to two knots an hour when the collision occurred, which would make some difference in the computation?

The Court: While I am bothering you, does the last clear chance rule apply in admiralty?

Mr. Young: Yes, your Honor.

The Court: What is your view about it?

Mr. Wood: I think it does, if it is plainly there. I think it has to be very plainly there. The ordinary rule, I think, is that where one vessel by her primary fault has put the vessels in a situation where the collision may occur, why that primary fault is the one that has the great importance attached to it.

The Court: This doesn't happen to be the Pennsylvanian that was the genesis of that rule, this particular Pennsylvanian?

Mr. Wood: You mean the Pennsylvania rule?

The Court: Wasn't that the rule you just stated?

Mr. Wood: No, the Pennsylvania rule is that where one vessel has committed a statutory violation, the burden is on her to prove not merely that that did not probably cause the collision but that it couldn't have caused it. That is not this ship. That rule, I think, began in 1870, something like that.

Mr. Young: I assume counsel means where there is actually a statutory violation to start with. [545]

(Testimony of Oscar Nelson.)

The Court: Well, we will determine that later on.

Mr. Wood: Now, this discussion has diverted my attention a little bit from where we left off.

Q. Mr. Nelson, did you see the Barry "K" ahead of you down the river?

A. I saw the——

Q. The lights?

A. I saw the lights from the Barry "K".

Q. And about how far away was she when you saw her, do you think?

A. When I first saw her?

Q. Yes.

A. When I first saw her, she was about a mile away.

Q. And what lights did you see?

A. The first lights I saw were brilliant lights around the deck, which were not the navigation lights. They were the first lights that drew my attention, but almost immediately after I saw the white—two white towing lights and the red side light.

Q. Could you tell at that distance which side of the river she was on? A. No, sir.

Q. What whistle signals were exchanged?

A. The Barry "K" blew one short blast of the whistle, a passing signal, one short blast of about a second's duration.

Q. Where were you when you heard that?

A. I was in the wheelhouse. [546]

(Testimony of Oscar Nelson.)

Q. And what did the Pennsylvanian do in answer?

A. The Pennsylvanian answered the signal with one short blast of the whistle.

Q. Was that short blast from the Barry "K" a clear one and distinct so you could tell definitely what it was or was it a whistle that left you in doubt? A. Distinctly one blast.

Q. Yes. Was there any doubt in your mind when you heard it that it was one blast?

A. No, sir.

Q. Did you hear Captain Norberg say, "That was one blast" or "Was that one blast"?

A. Yes, sir, he said something about one blast and we all—Captain Vaux and I both confirmed it.

Q. Is this a practice to do that?

A. Yes, sir, it is.

Q. Well, then, what side light of the Barry "K" was showing to you at the time of that one blast?

A. The red side light.

Q. Later on, did she show her green light?

A. Yes, sir, she did.

Q. Could you give any estimation of how far apart the vessels were when she showed her green light?

A. Oh, I would say—I don't know exactly; about half a mile, it looked like to me. [547] It might have been closer.

Q. And what was done with your engines on your ship when the Barry "K's" green light appeared?

(Testimony of Oscar Nelson.)

A. The engine was put half ahead and then stopped, almost immediately afterwards.

The Court: What does the bell book show as to the time of that?

Mr. Wood: The bell book shows both those signals at 12:54, your Honor.

The Court: And the collision was 12:55?

Mr. Wood: To the nearest minute.

The Court: Had he made those entries?

Mr. Wood: I am just about to ask him.

Q. The Court wants to know whether you are the man that kept that bell book and made those entries?

A. Yes, sir, I made all of these entries.

The Court: Q. Did you make that right at the time?

A. Yes, sir, right at the time.

Q. Before the collision, you wrote down that notation?

A. Before the collision, yes, sir. When I got the——

Q. You are a man of great concentration.

Mr. Wood: That is the regular duty.

A. If I don't write them down right away, your Honor, why they run up on me; I wouldn't be able to catch up.

The Court: Q. Evidently you didn't anticipate a collision [548] right at that time?

A. No, sir.

Q. Although you collided less than two minutes later?

(Testimony of Oscar Nelson.)

A. Less than two minutes, yes, sir.

Mr. Young: May I see the book, please?

Mr. Wood: I want to defer until I get the book back.

The Court: Yes, sir.

Mr. Young: I didn't want to interrupt your examination.

Mr. Wood: Q. Now, your bell book entry there shows that at 12:50, I think. Is this right, 12:50 the engines were put full speed ahead?

A. 12:50 was full speed ahead, yes.

Q. Then at 12:54 your entry shows half ahead, stop? A. Half ahead and stop.

Q. And those bells followed immediately one on the other, you say?

A. Yes, sir, they were some seconds apart, a few seconds.

Q. What?

A. They were a few seconds apart.

The Court: Then the next entry. I assume, was the collision at 12:55, or full astern?

Mr. Wood: I was just going to come to that.

Q. Well, in this interval between the half ahead and stop, you say a few seconds apart. Do you mean just enough seconds there to indicate two separate signals or what do you mean? [549]

A. Well, it indicates two separate signals. There is half speed on the telegraph and the engine room repeated the half ahead and almost immediately after that was the stop.

(Testimony of Oscar Nelson.)

Q. I see. A. And they repeated the stop.

Q. All right. Now, that was to the nearest minute at 12:54, according to your record?

A. The nearest minute, yes.

Q. Now, at that time had you received any danger signal yet from the Barry "K"?

A. No, sir.

Q. Now, about how long after that did you give the full speed astern? A. About a minute.

Q. Yes. And what was the reason for you giving that full speed astern?

A. The Barry "K" had blown a danger signal.

Q. The first one?

A. The first one, yes, sir.

Q. On receipt of that first danger signal from the Barry "K", your engines were put full speed astern; is that what you mean?

A. The Pennsylvanian's engine was put full speed astern and the pilot blew three short blasts of the whistle to indicate the fact.

Q. I say, was that done immediately you heard the danger signal from the Barry "K"? [550]

A. Immediately.

Q. And because of that danger signal?

A. Because of that, yes, sir.

Q. Now, what entry do you have in your bell book showing what time that was done; what does your bell book say as to the time? A. 12:55.

Q. 12:55. And you have another entry there for the same minute have you not, the word "hit"?

(Testimony of Oscar Nelson.)

A. Yes, sir.

Q. Now, were those two things together or was there an interval of time between the reversing and the collision?

A. There was an interval there of about—approximately a half to three quarters of a minute.

Q. Between your full speed astern and the collision?

A. Yes, sir.

Q. Did you notice—I don't know whether you were busy with other duties or not—did you notice whether your ship's head swung to the right on the reversing of the engines when she went full speed—

A. Yes, sir, the ship swung to the right; her head swung to the right.

The Court: Q. You never heard a starboard to starboard signal at any time?

A. No, sir, I didn't.

By Mr. Wood:

Q. Well, did you see any lanterns or lights on the barges of the [551] Barry "K" before the collision?

A. No, sir, I did not.

Q. Did you see any there after the collision?

A. I saw a lantern.

Q. Describe it.

A. A lantern of—one of these tall types, like they use on construction work or farmers use them, or watchmen.

Q. How did you happen to see them?

(Testimony of Oscar Nelson.)

A. Captain Vaux drew my attention to it.

Q. Is that when he put——

A. He had the search light on the barge.

The Court: Why did he draw your attention to it?

A. He called my attention to the light, your Honor; he says, "Take a look at that light," he says, "this is going to be important."

Q. What did you understand he meant by that?

A. I understand he meant that I take good notice of where that light was.

Mr. Wood: Q. Where was it?

A. It was standing on the deck on one of the corners of the barge.

The Court: Q. You mean in the wrong place or what? What do you mean? Explain that a little further.

A. It was on top of the——

Q. What did you understand the Captain wanted you to take note of it for, because it was in the wrong place or because it was an [552] improper light?

A. Because it was an improper light, yes, sir.

Q. And was the only light?

A. And was the only light, yes, sir.

Mr. Wood: Could you tell whether it was burning or not?

A. I didn't notice; it didn't look as though it was burning, to me. Of course, the search light was on it at the time and it is hard to tell whether it was burning or not.

(Testimony of Oscar Nelson.)

Q. Yes. The Court asked you whether you at any time heard any starboard to starboard signals from the Barry "K". Do you remember his asking you that? A. Yes.

Q. And you said "no." I will ask you whether you were listening for signals or whether you were attentive?

A. At the time I was concentrating more on listening for the pilot's orders, to see that his orders were carried out properly.

The Court: Q. Why were you concentrating on that so closely?

A. Why, I had to ring the telegraph and watch that I got the return——

Q. Yes, but why were you concentrating so closely at that particular time? That is your job all the time, to watch the telegraph and see that you get the return, isn't it?

A. Yes, sir, that is right.

Q. Why at that particular time were you so occupied with that more than usual? [553]

A. I just happened to be a little more than usual, your Honor.

Q. Why?

A. Just can't say why; it just happened that way, I believe.

Mr. Wood: That is all.

The Court: We will take the morning recess. I suggest fifteen minutes.

(Whereupon at 10:45 o'clock A.M. a short recess was taken.)

(Testimony of Oscar Nelson.)

The Court: Q. Have you ever been in a collision before, Mr. Nelson?

A. Yes, sir, I have.

Q. Have you testified in collision cases before?

A. I testified in front of the Steamboat Inspectors at Los Angeles.

Q. How old are you? A. Forty-three.

Q. Where were you born?

A. Michigan, sir.

Cross Examination

By Mr. Young:

Q. You testified, Mr. Nelson, that with the search light playing upon this light that was on the barge, it was difficult for you to tell whether the light was lighted or not; is that correct?

A. Yes, sir. [554]

Q. Is that due to the brilliancy of the search light blotting out any light that might have been in this lantern? A. Yes, sir.

Q. I noticed, Mr. Nelson, that you called that a construction lantern. Where did you get the word "construction" lantern?

A. Why, that is what I have always heard that type of lantern called.

The Court: Q. Mr. Nelson, they used to be good in barns in Michigan, too.

A. We use them up there.

Mr. Young: Q. You used them up there, did you? A. Yes, sir.

Q. I noticed that you and Captain Vaux and

(Testimony of Oscar Nelson.)

Captain Norberg all called this a construction lantern. Did you by any chance discuss that matter among yourselves after the accident?

A. Not in regards to the lantern.

Q. You had no discussion with either of those two——

A. I remember when Captain Vaux referred to the lantern first, he says “a regular construction lantern.”

Q. When Captain Vaux called that matter to your attention, what did you understand he was doing, preparing you as a witness for a possible lawsuit? A. Possibly, yes.

Q. I see. Now, referring to this bell book from which you were testifying, I am now pointing to the part of the bell book [555] where appears the 12:50 A.M.; is that your handwriting? A. Yes.

Q. And this says “January 31.” That should be February 1, shouldn’t it?

A. It says February 1 here.

Q. I beg your pardon. That is in the body here, isn’t it? Now, at this place where it says 12:50 right after that, there is some kind of a hieroglyphic that I don’t understand. What is that?

A. Oh, that is the full ahead signal to the engine room.

Q. Is that a mark that you have to indicate full ahead? A. Yes.

Q. It doesn’t say “full ahead” in so many words, does it? A. No, sir.

(Testimony of Oscar Nelson.)

Q. Then right alongside of that appears 12:54 and another sort of mark. What does that mark mean? A. That is half ahead.

Q. And what does the "X" mean?

A. Stop.

Q. Now, 12:55, and there is a mark after that. What does the mark there mean?

A. Full astern.

Q. And then the word "hit" appears. That means the collision occurred? A. Yes.

Q. 12:59 there is an "X". [556] A. Stop.

Q. What do you mean by "stop" at that time?

A. That meant that the full astern—the bell was changed from full astern to stop.

Q. But up here after the 12:54 you have an "X" also, which means stop, doesn't it?

A. That means stop.

Q. Well, did you have two stop orders there, one at 12:54 and one at 12:59?

A. Yes, sir, that is right.

Q. Do I understand from this that the Pennsylvanian was in motion then from the time the collision occurred until 12:59? A. In motion?

Q. She was in motion or was she?

Mr. Wood: He is asking you.

Mr. Young: Q. Was she in motion between 12:55 and 12:59?

A. Yes, she was in motion.

Q. Which direction was she going?

A. That I can't say.

(Testimony of Oscar Nelson.)

Q. You didn't make any notation here in your bell book as to what direction she was traveling?

A. No, I couldn't say that.

Q. You next have a notation of 1:02 with a caret mark after it. What does that caret mark mean?

A. Slow ahead. [557]

Q. Slow ahead. Then 1:03 means stop again?

A. Stop.

Q. What was the occasion for that slow ahead and stop; do you know?

A. I believe the pilot was—he was maneuvering the vessel, trying to straighten her out.

Q. Now, Mr. Nelson, am I correct in my understanding that according to your notations here, the *Pennsylvanian* was in motion some direction all the time from 12:55 to 12:59 A.M.; is that correct?

A. She was in motion, but I can't say what direction.

Q. Is there anything on your record there to indicate which direction she may have been going either before or after this notation of 12:55 and 12:59? A. No, sir.

Q. Now, will you tell us again just what whistles you actually heard from the *Barry "K"*; what was the first whistle you heard?

A. The first whistle I heard was one short blast, a short while after we straightened out after coming off the Post Office Bar range, approximately a minute.

Q. Then did the *Pennsylvanian* answer that whistle?

(Testimony of Oscar Nelson.)

The Court: Q. What did you say just then, approximately what?

A. Approximately a minute after we left the range, yes, sir.

Mr. Young: Q. Is there anything in your bell book to indicate that or is that from memory? [558]

A. I knew it was a little after the time we went full ahead.

Q. There is no notation in your bell book on that point, is there? A. No, sir.

Q. In fact, you don't keep a record of whistles in your bell book, do you? A. No, sir.

Q. Then was this whistle from the Barry "K" answered by the Pennsylvanian?

A. Yes, the whistle was answered.

Q. By what kind of a blast or blasts?

A. One short blast.

Q. And what is the next whistle that you heard?

A. The next whistle I heard was the danger signal from the Barry "K".

Q. Yes. And how many blasts was that?

A. I couldn't say definitely how many blasts it was. It was several. It was four or more.

Q. And was that answered by the Pennsylvanian? A. No, sir.

Q. The danger whistle? A. No, sir.

Q. It was not?

A. It was not answered, no, sir.

Q. Well, have you now, then, told us all of the whistles that you heard from either boat? [559]

(Testimony of Oscar Nelson.)

A. No, I have not.

Q. All right now. What whistle is there that you have not yet mentioned?

A. The three whistles from the Pennsylvanian indicating going astern.

Q. Was that after you heard this danger whistle from the Barry "K"? A. Yes.

Q. Well, then, do I understand that this was the order in which you heard the whistles: First you heard one blast from the Barry "K", answered by one blast from the Pennsylvanian?

A. That is correct.

Q. Next you heard a danger whistle of four or more blasts from the Pennsylvanian—

A. No.

Q. I mean from the Barry "K". Pardon me. And after that you heard three whistles from the Pennsylvanian? A. Yes.

Q. Are those all of the whistles that you heard?

A. That is all I heard.

Q. You wouldn't say, however, but that there were other whistles that you did not hear?

A. It is possible that there were other whistles, but I didn't hear them.

Q. There may have been other whistles either from the Barry "K" or from the Pennsylvanian that you did not hear? [560]

A. There were no more from the Pennsylvanian.

Q. You have told us all of the whistles that were blown by the Pennsylvanian? A. Yes, sir.

(Testimony of Oscar Nelson.)

Q. But there may have been some then from the Barry "K" that you didn't hear? A. Yes.

The Court: Q. Going back to your speed on the range, ordinarily you wouldn't go full speed until you had left the range, would you? A. Yes.

Q. Would you go full speed——

A. We don't have any definite place to go full speed.

Q. I understand, but the water being what it is and the channel being what it is, ordinarily you would run clear down that range and turn off it before you went full speed, or do you know about that?

A. It is the usual custom in my experience to run down about that far at slow speeds and half speeds and the reason for that, I think, is on account of a lot of brilliant lights along the bank on both banks there up to that point. And also draw bridges and small boats coming up from the——

Q. So when we find in the bell book there the time when you went full speed ahead, in your view that is when you got off the range?

A. Yes, sir. [561]

Q. That is when you left the range.

Mr. Young: The last bridge that you had occasion to go through was up at St. Johns, wasn't it?

A. St. Johns, yes, sir.

Q. And how far would that be from the place where this accident occurred?

A. I don't know definitely.

(Testimony of Oscar Nelson.)

Q. It is a considerable distance up the river from the point of accident, isn't it?

A. It is not very far.

Q. A couple of miles, would you think?

A. It may be that much. I couldn't say for sure.

Q. Now, where are these brilliant lights that you said would trouble you if you went faster than half speed along Post Office range?

A. Why, there is a lot of them all along the bank there as far as Linnton.

Q. As far as Linnton? A. Yes.

Q. Well, Linnton is up opposite St. Johns, isn't it? A. Yes.

Mr. Wood: Pardon me, Mr. Young; he never said white lights were bothering him along the range.

Mr. Young: I want to get this clear. Do you mean to say that there were any lights along either bank of the river in the [562] vicinity of Post Office range that made it necessary for the Pennsylvanian to go half speed along the range?

A. No, sir, there isn't.

Q. That is what I was getting at. As a matter of fact, don't you customarily start going full speed ahead as soon as you get about to the city limits of Portland?

A. Well, sometimes we do and sometimes we don't.

Q. The city limits are some distance upstream from Post Office range, aren't they?

(Testimony of Oscar Nelson.)

A. The city limits are approximately at Terminal 4.

Q. Yes. Then as I understand, sometimes at that point you go full speed ahead and sometimes you don't; is that right?

A. I couldn't say definitely whether that is the case or not. To the best of my memory it is.

Q. How frequently have you had occasion to travel through the Willamette River?

A. About once every two months or so, two and a half months or twice every two and a half months.

Q. Through what period before this accident?

A. For a period of about ten years.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. Mr. Nelson, this bell book of yours is what its name implies, it is a record of the bells given, is it not? [563]

A. Yes, sir.

Q. That is all it is, isn't it?

A. That is all it is, yes, sir.

Q. It is a record of the orders that are given on the bridge by means of the telegraph to the engine room?

A. Yes, sir.

Q. It is nothing more than that, is it?

A. Well, sometimes we keep a note of certain places we pass.

Q. Like this "hit," I don't mean that, but this is not a record of the ship's movements, is it?

A. No, sir.

(Testimony of Oscar Nelson.)

Q. So what did you mean when you said in reference to this bell book that there was one stop order at 12:50 and then some intervening bells and another stop order at 12:59; why did you say that the ship was in motion all that time from 12:50 to 12:59 if the book is no record of the ship's motion?

A. Well, the ship must have been in motion one way or the other, whether it was ahead or astern or sideways; the engine was going full astern and tending to throw her head to the right, so she must have been in motion that way. And as far as her headway, I can't say how much motion, and if there was sternway, I couldn't say whether they had sternway.

Q. You couldn't say whether she was swinging, how much to the right or what?

A. No, sir, she was in motion anyhow. [564]

Q. That is what you meant? A. Yes.

The Court: Q. That stop was 12:54, wasn't it?

Mr. Wood: No, your Honor—yes, excuse me; did I say 12:50?

The Court: Yes.

Mr. Wood: Excuse me. I was wrong. It is "stop" at 12:54. A. 12:54 is the stop.

Mr. Wood: Yes, I would like the record corrected to show that.

Q. You said that the only whistles that you remember hearing from the Barry "K" were the one blast and the danger signals. After the Pennsylvanian blew her three blasts to indicate her en-

(Testimony of Oscar Nelson.)

gines going astern, there has been some testimony that the Barry "K" then followed that with three blasts. I want to know whether you heard those or not.

A. I didn't hear those, no, sir.

Q. Were the running lights and navigation lights of the Pennsylvanian all in order?

A. Yes, sir, they were in order.

Q. And burning? A. And burning.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.) [565]

EARLE B. VAUX

was recalled to the stand and testified further as follows:

Cross Examination
(Continued)

By Mr. Young:

Q. Captain Vaux, you testified that it was the custom for the pilot on the steamer to confer with other persons on the bridge with regard to the identity of whistles that might be heard from other ships; is that correct?

A. Well, you would confer—it is kind of misleading, Mr. Young.

The Court: "Confirm" is the word they always use.

(Testimony of Earle B. Vaux.)

A. (Continuing): "Confirm" is the word.

Mr. Young: Q. Was the practice for the pilot to have his own ideas, let us say, confirmed then by other persons on the bridge with regard to the identity of whistles; is that right?

A. Will you please state that question again?

Q. You said that when Captain Norberg heard a whistle he turned to you and asked if that was one blast—did he?

A. They don't ask if it is one blast. They make a remark of "One blast."

Q. Is that what he did on that occasion?

A. Yes, sir.

Q. Now, did I understand you to say that that is a custom or practice for pilots always to do that?

A. In my experience, yes, sir.

Q. And your experience is confined to the American-Hawaiian? [566] A. True.

Q. Isn't it a fact that that custom relates to a situation where the pilot is in doubt as to what he hears? A. Absolutely not.

Q. Does he make that comment; does he call out what the signal is irrespective of whether he is certain that he knows what the signal is?

A. He calls out when he hears what he believes and that in his mind is a signal, he makes that remark, yes, sir, whether that vessel is close aboard or a long ways away. It doesn't make any difference if the vessel is astern desiring to pass, he will make that remark, yes, sir.

(Testimony of Earle B. Vaux.)

Q. Does this custom to which you refer include mentioning anything unusual that might be happening apart from signals?

A. Nothing unusual happened.

Q. For example, Captain Norberg said that he saw a sheer of the Barry "K". Was it part of the custom for him to mention that to other men on the bridge?

A. I don't recall that testimony that he saw her sheer.

Q. I think he did so testify, but did he say that to you at the time—before the collision?

A. I don't recall that conversation myself, Mr. Young.

Q. Well, let us assume that the pilot did see a vessel approaching from ahead and that vessel took a sheer, would it be part of this custom that you are referring to that the pilot should [567] mention that to other men on the bridge?

A. He would probably act first and then discuss it afterwards.

Q. He would act first and discuss it afterwards?

A. In case of an emergency.

Q. But if it were a whistle he would talk first and act later; is that right?

A. Well, you speak of talking first and acting later; there seems to be quite an interval of time. Those things happen almost instantly. You will remark that it is one blast and whatever you heard, why you will mention or repeat that it was one blast

(Testimony of Earle B. Vaux.)

or it wasn't one blast, or if there was any doubt, you would say so.

Q. Now, in the event, when Captain Norberg said to you "One blast," that you had been of the impression that that was two blasts and you said, "No, two blasts," then what would happen after that?

A. Then there is only one thing that could happen.

Q. What?

A. The danger signal would be given to know that you didn't understand what the other vessel is going to do.

Mr. Young: That is all.

The Court: Q. Now, that is what the danger signal means in a situation like this?

A. Yes, sir.

Q. It is intended to tell the other man—— [568]

A. That you are running into danger.

Q. And that you don't understand him?

A. Yes, sir.

Redirect Examination

By Mr. Wood:

Q. Captain Vaux, counsel's questions to you about a sheer, whether Norberg would confirm to you if the other vessel was taking a sheer, implied that that sheering was something quite unusual. Now, in your testimony before it was that a temporary sheer from an approaching ship——

Mr. Young: If the Court please, I object to

(Testimony of Earle B. Vaux.)

counsel commenting upon the evidence in this manner. He may ask the witness questions, but he is now making a speech.

Mr. Wood: I thank you for the compliment. I didn't know I was such an orator.

Mr. Young: I didn't say you were an orator; I said you were making a speech.

Mr. Wood: Q. Captain Vaux, is a temporary sheer by an approaching vessel, especially the distance apart that you have spoken of, an unusual thing? A. No, sir, it is not unusual.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. One more question, Captain. Suppose that pilot Norberg [569] or you had understood the first signal from the Barry "K" to be two blasts instead of one, what would you have done then?

A. Answered with two.

Q. You would have answered with two?

A. If you understood it to be two blasts, yes, sir.

Q. And then if you had answered with two, you would have made a starboard to starboard passage, wouldn't you?

A. If there wasn't any danger, yes, sir.

Q. Well, on that particular occasion, suppose you had understood the signal from the Barry "K" to be two blasts instead of one.

A. That never came up, Mr. Young.

(Testimony of Earle B. Vaux.)

Q. Well, I am just asking you now, what would have been your—you would have answered with two blasts; is that correct?

A. The pilot was in charge.

Q. What? A. The pilot was in charge.

Q. Would it have been the duty of the pilot to answer with two blasts?

A. I don't know what the pilot would have done at that time.

Q. Why is it you are changing your answer now, Captain? A. I am not, sir.

Q. You testified a few moments ago that if there had been two blasts from the Barry "K", the answer from the Pennsylvanian would also have been two blasts?

A. By law it would have been two blasts. [570]

Q. That would have meant a starboard to starboard passage, wouldn't it? A. Yes, sir.

Mr. Young: That is all.

The Court: Q. Well, Captain, you could have rejected his signal, couldn't you?

A. You could have given the danger signal, if danger had existed, yes, sir.

Q. If, in your opinion, a starboard to starboard passing was not safe or practicable, you could have rejected his signal and given him the danger signal, couldn't you? A. Yes, sir.

Q. And then both presumably would have checked your speed and—

(Testimony of Earle B. Vaux.)

A. Gave the proper passing signals, yes, sir.

Q. Settled it in some other way. I don't know what you do after you get stopped. That never occurs in any of these cases; nobody ever gets stopped.

Mr. Young: That is all as far as I am concerned.

(Witness excused.) [571-572]

Mr. Wood: Call Captain Lumm.

WILLIAM LUMM,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Lumm, are you a resident of Portland? A. Yes, sir.

Q. And have resided here a great many years, have you not?

A. About forty-five years.

Q. And what has been your occupation here?

A. Working on the river, steamboats.

Q. In what capacity?

A. All capacities except on the deck, in the deck compartment.

Q. What has been your experience as a towboat man here on the river handling tugs and tows?

A. Well, I towed barges here for about—exclusively for about, oh, approximately eighteen years, sixteen or eighteen years.

(Testimony of William Lumm.)

Q. What kind of barges were they?

A. All kinds.

Q. And what kinds of towboats did you handle?

A. Mostly stern-wheelers.

Q. Like this Barry K?

A. Well, something similar, yes; some smaller.

Q. And during that eighteen years that you were towing barges, [573] who was your employer or employers?

A. I worked for the Diamond O Navigation Company about eight years.

Q. That is Mr. Drake O'Reilly's company?

A. Yes.

Q. And what other company?

A. Well, I worked, myself; I owned my own boat.

Q. You had your own boat? A. Yes.

Q. And what experience have you had, if any, as a river pilot of ocean steamers?

A. Well, I have piloted ocean steamers for about five years—four years.

Q. Are you a member of this Columbia River Pilots Association? A. No, I am not.

The Court: Couldn't you get in the lodge?

A. Apparently not.

Mr. Wood: Q. You might explain that answer. What do you mean? The Court asks you whether you could not get in the lodge and you said apparently not. Have you anything further to say on that?

(Testimony of William Lumm.)

A. I suppose he refers to the Columbia River Pilots Association.

Q. Yes, he does.

A. Well, I made application to join them and they never saw fit to take me in. Perhaps they never needed me or something. I don't know.

Q. What? [574]

A. They never took me in, anyway.

The Court: They are pretty choosy, are they not?

A. Well, I think so. They have a right to be.

Mr. Wood: Q. Their ocean steamers, of course, are of many different sizes. I want to know whether you have acted as pilot on steamers of a comparable size as the Pennsylvanian and ships of that general type.

A. Yes, I think I have piloted ships as large as the Pennsylvanian.

Q. And have you handled tugs and tows of similar character to the one that the Barry K had the night with the barges?

A. I think she had two—did she have two barges? I am not familiar with what she did have, exactly.

Q. Yes. I will show you what she did have with the photographs. You may look at all of the photographs, if you want to. They are all in evidence.

A. I don't recall distinctly that I ever had two covered barges in tow at one time. I might have.

Q. Have you ever towed sawdust barges?

(Testimony of William Lumm.)

A. Yes. Yes, I have towed sawdust barges, two sawdust barges.

Q. They are higher up in the air?

A. Well, I have towed two of those at one time many times.

Q. Are you familiar with the channel in the Willamette River at Post Office Bar?

A. Quite familiar.

Q. How many years have you been navigating up and down through there? [575]

A. About thirty years pretty steady.

Q. Pretty steady. You mean comparatively frequently? A. Yes.

Q. Do you know what the width of that channel used to be before it was widened to its present width?

A. Well, at one time when I first went down there it seems to me it was pretty narrow. I don't know exactly, but I don't think it was very wide. I know we were towing sailing ships and we had to keep pretty close to the jetty, there, but I was only mate then and I didn't know exactly what width the channel was.

Q. How wide, approximately, is it now, the dredged channel?

A. I think it is around eight hundred feet.

Q. How do ocean steamers meeting in that channel pass? A. They pass port to port.

Q. How do towboats with tows meeting there pass ordinarily?

(Testimony of William Lumm.)

A. Well, the log boats with tows always keep over to the east side of the river, but barges, the majority of them, I think, probably use the east side.

Q. Going which way?

A. Coming upstream.

Q. I mean, if a towboat and a barge are going down and a towboat and a barge are coming up, how do they customarily pass?

A. Well, they frequently make a port to port passage.

Q. Yes. Now, when an ocean steamer going down meets a towboat and a barge coming up, how do they pass? I mean, is there a regular [576] way to pass, or do they pass both ways, or what is it?

A. I think they pass both ways, is my experience.

Q. What do you say? What is your opinion as to whether or not it is safe and practicable for an ocean steamer going down and a towboat with two barges and tow coming up to make a port to port passage, there?

A. Why, it is perfectly safe.

Q. Is it practicable? A. Yes.

Q. Assuming that a river boat, there, the Barry K, with ordinary power, as such boats have, is coming up there with two loaded barges at night time and there is a ten- to fifteen-mile breeze from the East and, say, a half mile to a mile current going

(Testimony of William Lumm.)

down the river, would those conditions be adverse for the up-coming tug and tow to keep to her right-hand side?

A. A ten- or fifteen-mile wind wouldn't amount to anything with loaded barges and a boat of that power.

Q. And how about a half a mile or a mile of current? Would that amount to anything against her?

A. Oh, it slows her down slightly.

Q. I mean, would it render it impracticable for her to keep to the right-hand side? A. No.

Q. Would she steer and handle better going up against such a current or coming down with such a current? [577]

A. Well, she steers slightly better going against the current, a little quicker.

Q. Now, if she were coming up under the conditions I have described, would there be what some of the witnesses have called a slip on her part in toward the right-hand bank?

A. There shouldn't be any perceptible slip, no.

Q. If there was any slip at all under those conditions, how much would the towboat have to head out into the current and the wind to counteract the slip?

A. Well, she surely oughtn't to head out much more than three degrees under those conditions.

Q. One witness testified here that it would be necessary for the tug and barges to head out at an angle of 45 degrees. What would be the result if she did head out 45 degrees? What would she do?

(Testimony of William Lumm.)

A. Well, if he held her out 45 degrees you would certainly run across the river pretty quick, if he was going ahead.

Q. If she were coming up there on the right-hand side and heading out at some slight angle, three degrees or even five degrees, to keep off the right-hand bank, how close could her stern be to the old piling there and still be perfectly safe?

A. Well, as long as it didn't hit the piling it wouldn't hurt anything. She could be up there close if she wanted to, if she didn't hit the piling. It wouldn't hurt anything.

Q. Were you sitting in the court room when some of the Barry K's witnesses testified to the effect of a displacement swell? [578]

A. No, I wasn't.

Q. Well, if an ocean-going steamer were coming down on the range, there, and entering that channel and, say, going seven knots and half loaded, how much of a displacement swell would she make?

A. You mean how would it affect the barges or the tow?

Q. Yes.

A. Well, it would depend on how close they passed.

Q. Well, suppose they passed two hundred feet apart?

A. She wouldn't notice any swell two hundred feet away.

Q. How close would you regard it as safe for those two vessels to pass each other port to port?

(Testimony of William Lumm.)

A. Well, it is safe about a hundred feet, is practical. Of course, they usually leave more room than that, but if they were a hundred feet apart, we'll say.

Q. What is the comparative difficulty of navigation in that channel by a tug and tow, and the same tug and tow going through the harbor, here, of Portland through the bridges?

A. Well, it is a good deal closer working through the bridges than it is down there. You have got much more room down there.

Q. And how do those waters of Post Office Bar channel compare with the waters between here and Oregon City in respect to difficulties of navigation?

A. Well, there is no comparison. There is some quite bad water between here and Oregon City in certain stages of the river.

The Court: What is bad, did you say? [579]

A. Quite bad water up there at certain stages of the river.

Mr. Wood: I think that is all.

Cross Examination

By Mr. Young:

Q. Captain Lumm, I did not understand what you said with regard to by whom you are now employed.

A. I am not employed.

Q. How long has it been since you were last employed?

A. About seven months.

Q. And by whom were you employed the last time?

A. Matson Navigation Company.

(Testimony of William Lumm.)

Q. That was to pilot one of their vessels?

A. Yes, sir.

Q. Prior to that time you have been employed from time to time by different companies, have you?

A. Yes, sir.

Q. Captain Lumm, you testified that it was your observation during the past thirty years that log rafts always use the east side of the river in the vicinity of Post Office Bar. Am I correct about that?

A. Yes, I think that practically all of them use the east side.

Q. Did you ever tow a log raft yourself?

A. Very few.

Q. Well, did you ever tow a log raft past Post Office Bar?

A. No, I don't believe I ever did. [580]

Q. Do you know why it is that the log rafts have made it a practice to use the east side of the river at Post Office Bar?

A. Well, it is a little easier water on that side and they keep over there. Formerly it was shallower over there and they kept over there to keep out of the way of the boats and so forth.

Q. To keep out of the way of what boats?

A. All boats.

Q. All boats. Well, it was a good idea, was it not?

A. Well, I suppose it was. I don't tow logs.

Q. You say there is shallow water over on that side?

A. Used to be.

(Testimony of William Lumm.)

Q. Well, even at the present time what is the depth of the water right up against the bank on the east side of Post Office Bar, do you know?

A. Well, it runs from thirty feet up to nothing.

Q. How far out do you have to go before you get to the thirty-foot depth, measuring it out from the east bank?

A. I think about a hundred or 150 feet.

Q. 150 feet. You would not think that 400 feet would be the correct distance in that regard?

A. Not there, I wouldn't.

Q. Not there. What do you understand to be the width of the ocean-going ship channel at that point?

A. Approximately eight hundred feet?

Q. Well, how much depth are you assuming in that distance of eight [581] hundred feet?

A. Thirty feet.

Q. Thirty feet. Well, there are lots of ocean-going ships that draw more than thirty feet of water that use the Willamette?

A. Not lots of them, no.

Q. There are some, at least?

A. Perhaps some.

Q. And there are at least lots of vessels that draw close to thirty feet of water, are there not?

A. Yes.

Q. Ocean-going ships drawing 28 or 29 feet of water would not be traveling in a thirty-foot channel, ordinarily, would they?

(Testimony of William Lumm.)

A. No, they wouldn't. But that thirty-foot is at zero stage.

Q. Well, the ship might have to be using the channel at zero stage, might it not? A. Yes.

Q. Assuming that there were thirty feet of water in the channel, you, piloting a vessel drawing, say, 27 or 28 or 29 feet, would not care about being in that channel, would you?

A. I wouldn't from choice unless it was necessary.

Q. Do you know what the width of the 35-foot channel is?

A. I think it is about—it is at least 600 feet.

Q. And that is true at Post Office Bar?

A. Yes.

Q. Now, have you operated or piloted towboats that were pushing [582] barges either up or down the river opposite Post Office Bar?

A. Yes, sir.

Q. And which side of the river did you use?

A. Either side.

Q. Either side? A. Yes.

Q. Well, now, why did you not stay over on the right-hand side going up, for example?

A. Well, sometimes I had a boat that didn't have very much power, and if I stayed over there I didn't get anywhere.

Q. You didn't get anywhere? A. No.

(Testimony of William Lumm.)

Q. That is, you mean you did not get anywhere over on the right-hand side going upstream?

A. There was a little more current over there. I got over on the other side to get out of the current.

Q. What variation in current would there be between the west side and the east side at that point?

A. Oh, I imagine you could make a difference there of at least a mile an hour, perhaps more.

Q. Would that small difference make any difference to you in the operation of a towboat?

A. It certainly would.

Q. Why so?

A. Because you wouldn't make over a couple of miles an hour at the best. [583]

Q. By what kind of engines were these towboats powered?

A. Steam.

Q. Steam?

A. And diesel.

Q. Steam and diesel. Now, when you were piloting a steam vessel, what did you do about this Article 25 of the Pilot Rules which talks about staying on the right-hand side of narrow channels?

A. I forgot about it.

Q. You forgot about it. Yes. Now, exactly what danger would there be to you, however, in bucking a current over on the west side?

A. No danger.

Q. Well, you said that you wanted to get over on the east side to get out of that current.

(Testimony of William Lumm.)

A. Yes, sir.

Q. Well, the current must have affected you in some way that it would cause you to want to go over there.

A. It slowed me down.

Q. Slowed you down? A. Yes.

Q. If you happened to have, in addition to that current, a stiff east wind, what would that do to you, coming up past Post Office Bar?

A. Well, it would depend on what kind of a tow you had.

Q. Suppose you were pushing either one or two barges.

A. Well, I suppose you infer there to a high house, do you?

Q. Did you ever push a barge with a high house? [584]

A. Yes.

Q. Did you ever push any barges up past Post Office Bar with houses that were as high as these the Barry K was pushing?

A. Yes, I have.

Q. How high would you think those barges were, the houses?

A. A rough estimate, I would think were about ten feet, maybe twelve.

Q. If you were informed that the testimony in the case shows they were twenty feet above the water line, would that make any difference?

A. I had reference to the house.

Q. How much then were you allowing for the barge, itself?

(Testimony of William Lumm.)

A. Well, the barge, I imagine, was about a ten-foot hole, eight- or nine-foot hole, something like that.

Q. That includes the part that was under the water, does it not? A. Yes.

Q. The testimony in this case is that the tops of the houses stood about twenty foot above the water line. A. Yes.

Q. And the barges were roughly 150 feet in length. The Barry K, itself, was 165 feet, and with one barge on her nose she was about a total of 305 feet in length over-all. Would you think that would offer considerable wind resistance?

A. Yes, it would.

Q. And the greater the wind resistance, or the stronger the wind, rather, the greater the wind resistance. Is not that true? A. Yes. [585]

Q. Suppose that you were proceeding upstream with a towboat and barges of that nature, what would the tendency be of an east wind if you were over on the right-hand side of the stream?

A. Well, it would be a tendency to blow her stern around a little.

Q. Now, are you familiar with the existence of a dike over there on the west side of the river?

A. Quite familiar.

Q. Quite familiar? A. Yes.

Q. That is not a very nice thing for a river boat to run into, it is? A. Oh, no.

Q. You mention in your testimony that if you

(Testimony of William Lumm.)

just missed it why everything would be all right, did you not? A. Yes.

Q. When you are operating a towboat, do you operate under such circumstances that you are going to just miss obstructions on the river?

A. Well, lots of times we run pretty close to them.

Q. You do not like to do that, do you?

A. Not unless it is necessary.

Q. Well, it is dangerous to do that, is it not?

A. Not if you can see them, it isn't.

Q. In the nighttime it is not so easy to see that dike, is it? A. No.

Q. And therefore you would like to stay farther away from the dike [586] at night than you would in the daytime, would you not? A. Yes, sir.

Q. As a matter of safety in the operation of a towboat and barges, is it not true that you do not run as close to physical objects in the water as you possibly could to see how close you can get without hitting them? A. No.

Q. You do that, do you?

A. No, we don't.

Q. You do not do that? A. No.

Q. You have to allow for a factor of safety, do you not, Captain? A. Yes, sir.

Q. In the case of a low-powered boat, then, pushing barges upstream past Post Office Bar and staying on the right-hand side, there would be more hazard to it than there would be if it were over on the east side. Is not that true?

(Testimony of William Lumm.)

A. Oh, no. I don't think so.

Q. You don't think so? A. No.

Q. You took some considerable time in answering that question, Captain. What did you have in mind?

A. Well, I couldn't see why there should be any more hazard on the west side than the east side.

Q. You couldn't see any more hazard. Is there any dike over on the [587] east side to run into?

A. Not right there, there isn't.

Q. What do these river boats ordinarily draw?

A. From a foot and a half to about five or six.

Q. And what do these barges ordinarily draw?

A. Approximately six feet, seven.

Q. In what depth of water would it be safe to operate those barges and river boats?

A. Why, they operate them as long as they will float.

Q. You could operate those boats of that sort way over against the east bank, could you not?

A. Yes.

Q. You could not do that with the ocean-going ship, could you?

A. Not right against the bank, no.

Q. Well, you would have to stay out a considerable distance from the bank, would you not?

A. Oh, you would stay out a couple or three hundred feet.

Q. You have testified that in a case of river boats generally past Post Office Bar, some of them

(Testimony of William Lumm.)

you say stay on the east side and some are on the west side. Is that right?

A. (The witness shook his head "Yes.")

Q. Why is it that river boatmen have adopted that practice of using the east side at all?

A. Well, it is a little shorter, is one reason.

Q. What other reason? [588]

A. Well, it is a little less current over there.

Q. Is it not true that boats over there are out of the way of ocean-going ships that would be using the main channel?

A. Well, they used to be years ago, the ocean-going boats favored the west side a little more.

Q. They can go a little bit farther east now than they could formerly? A. Yes.

Q. Nevertheless, does not the ocean-going ship prefer to favor the middle of the channel under circumstances?

A. Well, of course, not under any circumstances. They do.

Q. And why do they?

A. Well, it has got more room. They are safer there. They don't need to watch so close.

Q. For an ocean-going ship going downstream and staying, let us say, in the center of the main channel, there would be ample room between it and the east side for a river barge pushing barges to pass, going upstream, would there not?

A. Yes.

(Testimony of William Lumm.)

Q. When you are pushing barges upstream, do you ever have occasion to stop? A. Oh, yes.

Q. Well, now, suppose that you were going up on the west side opposite Post Office Bar and you were suddenly compelled to stop. What would happen? What would be the tendency of your boat under those circumstances?

A. Well, it depends on the conditions of the weather and the river [589] and the tow and various things.

Q. Yes. Well, if you had a breeze of, say ten to fifteen miles an hour from the East, what would be the tendency of that?

A. Well, we would stop and lose headway. It would blow you ashore, eventually.

Q. What would the current tend to cause you to do?

A. Well, it would tend to drift you downstream.

Q. It would drift you over against the west side, would it not?

A. Not necessarily the current.

Q. You testified there is a stronger current on the west side than on the east side, did you not?

A. Yes.

Q. Would not the effect of that current then be to tend to cause you to go over toward the east side? A. Not necessarily.

Q. Not necessarily?

(Testimony of William Lumm.)

A. (The witness shook his head "No.")

Q. You testified that river boats—that is, tugs with barges—will pass through the bridges here in the Portland harbor. Is that right? River boats will push barges through the draws of the bridges in Portland harbor?

A. Certainly.

Q. As a matter of fact, when a river towboat is pushing, say, a couple of barges through one of these draws, what speed does it ordinarily travel?

[590]

A. It depends how she is made fast to the barges. If she has got a barge on each side it makes a rather wide tow and she usually slows down as she enters into the draw.

Q. Is it not a fact that she will drift through?

A. No, it depends on what the conditions of the river are and so forth.

Q. Well, if you were operating a river towboat with two barges, one on the nose and the other, let us say, on the port side, and, say, you had a half-mile to a mile of current in the river at the point, would you or would you not drift through the draw?

A. I wouldn't drift through.

Q. Well, what would you do then?

A. It would depend on which way I was coming.

Q. Suppose you were going upstream.

A. Well, I would go right along just the same as if there was no bridge there.

Q. At what speed?

A. Full speed.

(Testimony of William Lumm.)

Q. Full speed? A. Yes, sir.

Q. What do you mean by "full speed" in miles per hour?

A. Well, as fast as the boat could go.

Q. Would you go full speed irrespective of the amount of clearance you had on either side of your barges as compared with the bridge?

A. Well, if I had a barge on my nose and one alongside, I would [591] know it would be approximately eighty feet wide, the tow.

Q. And what is the width between the draw, the opening in the draw, let us say at the Morrison Bridge? A. Approximately 150 feet.

Q. And if you had a towboat with two barges, which, we will say, were eighty feet in width, would you go through that draw at full speed?

A. Certainly.

Q. And how many miles per hour would you figure that to be?

A. As fast as the boat would go.

Q. Well, what do those speeds run?

A. Oh, they probably go about—a boat with good power would make—maybe make seven miles, six or seven miles an hour in slack water.

Q. You mentioned that the difficulties of operating in the river between Portland and Oregon City are, if anything, more serious than those down around Post Office Bar. A. Yes.

Q. Well, as a matter of fact, Captain, do ocean-

(Testimony of William Lumm.)

going boats ever go above the Ross Island Bridge anyway? A. No.

Q. So the problem of passing on the river between an ocean-going boat and a river boat does not exist above the Ross Island Bridge? A. No.

Q. You testified that at a distance of 200 feet away from an ocean-going ship going downstream at Post Office Bar you would not notice [592] any swell. Is that correct?

A. I don't know as the word "swell." I took it that it was the——

Q. I made a note you said you did not notice any swell. You meant displacement swell, did you not? A. I think so; yes, sir.

Q. Would it not, however, depend upon the speed of that ship as to how great a distance the displacement swell would stretch out on either side? Is that right? A. Yes.

Q. If a downstream vessel, or the vessel traveling downstream were going, say, twelve knots, she would throw out a lot more water on either side than if she were going only six, would she not?

A. Yes.

Q. Would you think that your two hundred feet of clearance would be adequate if the downstream vessel were traveling, say, twelve knots an hour?

A. Yes.

Q. You think it would? A. Yes.

Q. You mean the river boat would not feel the displacement swell at all?

(Testimony of William Lumm.)

A. It would shake him up a little bit but it wouldn't affect anything, wouldn't hurt anything.

Q. These barges are fastened to the towboats by cables, are they not, ordinarily? [593]

A. Well, cables or lines.

Q. Lines of one sort or another? A. Yes.

Q. You do not want any play, do you,——

A. No.

Q. ——between your barge on the one hand and the towboat on the other?

A. (The witness shook his head “Yes.”)

Q. And in so far as you have to encounter one of those swells, you run the hazard of those lines parting, do you not?

A. They very seldom part.

Q. Well, you said a moment ago that you do not care to run that risk, though. Is not that right? That is a real risk, is it not?

A. Oh, there is a certain risk.

Q. Have you ever been operating a towboat with barges upstream past Post Office Bar on the right-hand side of the stream at the time when you regarded it as unsafe to do so? A. No.

Q. Never have? A. No.

Q. Have you ever been in there when there was a stiff east breeze blowing? A. Yes.

Q. And you did not think it was unsafe even then? A. No.

Q. Have you ever been there in stormy weather? [594]

(Testimony of William Lumm.)

A. All kinds of weather.

Q. All kinds of weather? A. Yes.

Mr. Young: That is all.

Mr. Wood: Your Honor, I had only two or three questions. I should like to finish with the witness, if I could.

Redirect Examination

By Mr. Wood:

Q. Captain Lumm, in reference to the question of counsel as to whether you are employed at the present time, you said you had not been employed for the last seven months. Unless you have some personal objection to it, I want you to tell what was the cause of your cessation of employment.

A. Well, the union put out a picket line around the ship. The ship could not move.

Q. And you were pilot on that ship?

A. Yes.

Q. And this union picketed you, picketed the ship on account of you? A. Yes.

Q. And you were taken off the ship so the ship could move? A. That is right.

Q. Are all members of the Columbia River Pilots Association members of that union?

A. I think they are.

Q. Now, you said that sometimes steamers favor the center of the [595] channel. I do not know whether you were referring to this particular channel generally down the Columbia River, but that

(Testimony of William Lumm.)

does not make any difference. If they do favor the center of the channel they are really violating the rule which requires them to keep on the starboard side, are they not?

A. Well, they are, technically, yes.

Q. And if an ocean-going steamer came down this particular channel and favored the center, you said there would be room between here and the east bank for a tug and tow to pass? A. Yes.

Q. It is perfectly obviously true. But I wanted to ask whether there would likewise be room on the west side. A. There would.

Q. For the tugboat to pass? A. Yes.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. On the west side the channel comes over nearer to the bank, does it not, than on the east side? A. I think a little bit closer.

Mr. Young: One further question I want to ask this witness that I omitted to, your Honor.

Q. Captain, have you operated or piloted tow-boats down the Columbia [596] River as well as in the Willamette? A. Yes, sir.

Q. Well, are there not a number of places along the Columbia River where it is the practice for the river boats to stay on the left-hand side of the stream rather than on the right-hand side?

A. I don't know as it is with barges. They go

(Testimony of William Lumm.)

wherever they feel like it. They don't observe any rule.

Q. Don't observe any rule? A. No.

Q. Well, as a matter of fact, do you know, for instance, over near Mount Coffin, Washington, is there not a place over there for about half a mile where the river boats stay on the left-hand side?

Mr. Wood: I object to it as immaterial anyway.

The Court: He may answer. With tows, near Mount Coffin, what do the river boats with tows do, what side do they go on?

A. Well, they—I believe they do, yes.

Mr. Young: Q. Is not the same thing true for a distance from the lower end to the upper end of Batchelor's Island near St. Helens?

A. Yes, it is.

Q. And is not the same thing true from the Cleveland Dike to Walker's Island near Stella, Washington? A. Yes, it is.

Q. And is not the same thing true from Reeder's in the Columbia to St. Johns in the Willamette?

A. No, I don't think so. [597]

Q. How about from the mouth of the Willamette to Vancouver, to the first bridge?

A. Well, they go right up the center of the channel, there.

Mr. Young: That is all.

Mr. Wood: Is your Honor going to hold court until one o'clock? When is your Honor planning to adjourn today?

The Court: What was the next statement you made?

Mr. Wood: Captain Hosford just whipered in my ear that he understood we were going to hold court until one today.

The Court: Let us decide it now, regardless of prior understanding. How many more witness will you have, Mr. Wood? About how many?

Mr. Wood: I think I will only have one more immediately that is in the court room.

The Court: How much rebuttal, Mr. Young?

Mr. Young: Well, I will have three or four witnesses, your honor, but they will be short.

Mr. Wood: I said only one more now in the court room. I will have quite a number of witnesses, yet, but I have not brought them up here yet.

The Court: Let us work another hour then.

Mr. Wood: That is all.

(Witness excused.) [598]

L. O. HOSFORD,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct examination

By Mr. Wood:

Q. Captain Hosford, you are a resident of this city, are you not? A. Yes, sir.

Q. And what is your employment?

(Testimony of L. O. Hosford.)

A. I am a pilot for the American-Hawaiian Steamship Company.

Q. You are a regular pilot for the company?

A. Yes, sir.

Q. Piloting for that company only at the present time? A. Yes, sir.

Q. In other words, you are employed steadily on a salary as distinguished from these pilots who take a ship out for anybody when they are called.

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Is that correct?

A. Yes, sir. I do no other work for the American-Hawaiian Company.

Q. How long have you been working in that capacity for the American-Hawaiian?

A. Since the 1st of April, 1938.

Q. Are you a member of the Columbia River Pilots Association? A. No, sir. [599]

Q. What has been your experience to qualify you as a Willamette and Columbia River pilot?

A. Well, my steamboat experience started in 1906, and, with the exception of possibly two years' service at sea I have been constantly on the river ever since. Master, starting from a deck hand up to master of all various types of river vessels and towboats and passenger and freight boats.

Q. Your own family was in the towboat business, was it not, or river transportation?

A. In river transportation; yes, sir.

(Testimony of L. O. Hosford.)

Q. The Hosford Transportation Company?

A. It was the Harkins Transportation Company.

Q. What? A. Harkins.

Q. Well, how long have you acted as master or pilot of river steamboats?

A. Since 1909.

The Court: What was that name you called a minute ago?

(The reporter answered "Harkins.")

A. H-a-r-k-i-n-s.

The Court: Mr. Wood asked if your family was in the towboat business.

A. The Harkins Transportation Company operated freight and passenger busses, not towboats.

The Court: He asked you if they were your family. Were they your family? [600]

A. My father was founder of the Company, yes.

Mr. Wood: Q. And have you handled towboats and tows—— A. Yes, sir.

Q. ——similar to the one here shown in these photographs? A. Yes, sir.

Q. Has your experience in that been extensive or only on isolated occasions?

A. Well, I have had quite a little experience on towboats.

Q. Extending over years? A. Yes, sir.

Q. Are you familiar with the Post Office Bar channel? A. Yes, sir.

Q. Do you remember its successive stages of

(Testimony of L. O. Hosford.)

development so that you could give us briefly its history?

A. Well, as I remember as a young fellow when I first started steamboating, I don't know the exact width of the ship channel in there, but it was very narrow, approximately 250 or not to exceed 300 feet at the most, and the right bank of the river, right half of the river at that time was quite shoal.

Q. And then——

A. Gradually in different stages it was widened out, the ship channel, to its present width.

Q. You mean the Government dredging has widened it out? A. Yes.

Q. And its present width is what? [601]

A. Well, a 35-foot channel from six to seven hundred feet in width. In that particular locality thirty feet is eight hundred feet.

Q. Did you hear the testimony of Captain Lumm which he just gave about places on the Columbia River where tugs and tows left the ship channel and passed on the left-hand side?

A. Yes, sir.

Q. What? A. I did, yes.

Q. I did not make a note of all of those places, but I will ask you whether they are similar and comparable places to this one at Post Office Bar.

A. No, they are not.

Q. In what respect do they differ?

A. Well, the river is much wider at those points. The points that were mentioned are from

(Testimony of L. O. Hosford.)

a half a mile to a mile, and a mile and a half away from the ship channel.

Q. Now, what can you inform the Court as to the safety and practicability of this Post Office Bar channel for ships to pass port to port there?

A. It is safe and practicable, and they have always done it.

Q. Ocean steamers always pass that way?

A. Yes, sir.

Q. They did even in the old days when it was narrow, did they not?

A. Yes, sir.

Q. And how easy is an ocean steamer to handle in comparison with a [602] river steamboat and a tow.

A. Well, I wouldn't say it is as easy as a river boat and tow.

Q. Not as easy?

A. No.

Q. Now, you have answered about ocean steamers passing. What is your opinion as to whether it is safe and practicable there for a river steamboat with two barges ahead of her, as in this case, to pass a down-coming steamer port to port? Is that safe and practicable?

A. I consider it safe and practicable; yes, sir.

Q. What advantage has that law, Captain Hosford, to pass to the right, in giving pilots a right to rely certainly on what the other ship is going to do?

A. Well, in a narrow confined channel, especially one in a bend, one vessel is showing the other

(Testimony of L. O. Hosford.)

vessel your green light in the bend until they straighten up and line up with each other.

Q. Yes.

A. Were it not for a rule such as that, I would consider that there would be more or less of a doubt as to which side or the other that either vessel was going to take, and with a heavily ladened ship or deep draft, you pretty near have to make up your mind what you are going to do a little ahead of time. You can't change the course of a heavy vessel like that, like you can a river boat with a tow, and once you start to do anything why you pretty near have to follow through what you have started, and where you know that a vessel is going to keep to the right-hand side why you have that [603] sense of security and feeling of security that there will be no accident as long as each—the other fellow follows the rule the same as you intend to.

Q. You are familiar with the Barry K, are you not?

A. Yes, sir.

Q. You know her well, do you not?

A. Well, I know her. I have never been aboard her—I have never worked on her.

Q. You have seen her many times on the river and you have seen her towing barges, have you not?

A. Yes.

Q. If she were coming up on the Post Office Bar channel with a couple of barges, as shown in these photographs, and kept to her own right-hand side and came up the west side, how much clear

(Testimony of L. O. Hosford.)

water would she leave for the passage of the down-coming Pennsylvanian?

A. Well, she could—coming up the right-hand?

Q. Yes. A. Her right-hand side?

Q. Yes.

A. Well, she could, with safety, leave four hundred feet of the 3500-feet—or the 35-foot channel, which is more than we have in some places all told on the lower river.

Q. Now, you perhaps have heard the testimony on this night there was a 10- to 15-mile breeze blowing from the East. You heard that testimony? [604] A. Yes, sir.

Q. How serious a handicap would that be to the Barry K and her barges?

A. Well, I would say a 10- to 15-mile breeze is practically negligible.

Q. Would the Barry K have to angle out into the stream coming up there to counteract that breeze?

A. She probably would maybe half a point, maybe three or four or five degrees, not to exceed that, I wouldn't say, especially a loaded barge.

Q. How close could the Barry K go with her tow to the right-hand side bank and with the piling there, and be perfectly safe coming up?

A. Well, if he would give himself a hundred feet away from the dike would be ample room, as a safety factor.

(Testimony of L. O. Hosford.)

Q. By "the dike," you mean that odd piling that is strung along there?

A. Yes, along the west bank.

Q. How much effect on the tug and tow would the displacement swell of the Pennsylvanian have, if any?

A. Well, at seven knots she wouldn't have any.

Q. And how about this talk of the kick water? What have you to say about that?

A. A hundred feet away from the vessel there would be no effect from that either.

Q. Would you like to amplify that a little and explain why there [605] would be no effect from the kick water a hundred feet away?

A. Well, a vessel making a right turn, the majority of the weight from the wheel with a right rudder would be thrown away from the tow, were she passing to the right of the other vessel. And the other—

Q. You do not mean "passing to the right of the other vessel."

A. Well, on her left-hand side, port to port. With the rest of the weight to the wheel it would go directly astern to her, not over the width of the ship. A tow would have to practically cut right in behind the ship to get—to feel any effect from the weight from the wheel. I never heard it called kick water. That is a new term to me.

Q. You know what they mean, the thrust from the propeller?

(Testimony of L. O. Hosford.)

A. Yes, I learned what they mean.

Q. It is not as easy for a ship, especially a large ship like the *Pennsylvanian*, to go into a bend with a downstream current behind her as it is to go through the same bend with the current against her, it is? A. No, it is not.

Q. And if she has the current with her, she is harder to handle, is she not? A. Yes, sir.

Q. What do you think would be the comparative ease with which the *Barry K* could come up against that current on the right-hand side and the *Pennsylvanian* could go down with the current on that west side? [606]

A. I think the *Pennsylvanian* would run a greater hazard in hugging in on the west side than the tugboat would coming up?

Q. Why?

A. Because the current would naturally have a tendency always to flow into a bend and as the ship swung around, making the right turn, why she is longer, she is over four hundred feet long, and her stern would naturally have a tendency to drift in towards the west bank, more so than the towboat coming up.

Q. Suppose she had to stop and reverse there in a sudden emergency, as meeting another ship coming up, or anything you please. How would she swing?

A. Back to port. Her bow would swing off to starboard.

(Testimony of L. O. Hosford.)

Q. Out into the channel?

A. Yes, sir. If the vessel was swinging any to the right when you started backing, nothing could stop her from continuing to swing to the right. She would swing faster all the time.

Q. What effect would that have on a possible collision with an up-coming ship?

A. The minute you started backing the ship why your only chance is to get her stopped before you hit, because you have got no chance to stop her from swinging. She will continue to swing farther to the right.

Q. She would swing into the up-coming ship under those conditions? A. Yes, sir.

Q. I think I have covered all the different reasons they have advanced [607] but I will ask you a general question, whether or not in your opinion it was safe and practicable for the Barry K and her barges and the Pennsylvanian to pass port to port on that night as you have heard the conditions described.

A. I do think it is absolutely safe and practicable.

Mr. Wood: You may cross examine.

Wait just a minute, please. I forgot something.

Q. Captain Hosford, since this collision we were talking about, have you seen Western Transportation Company's towboats and barges passing steamers in that same channel?

Mr. Young: At what time?

(Testimony of L. O. Hosford.)

Mr. Wood: First I will ask him if you have seen them pass.

A. Yes, I have passed them myself on a number of occasions.

Q. How have you passed them?

A. Port to port. A majority of them port to port since the accident.

Q. In other words, the tug and the tow of this Libelant have come up on the right or the west side, there? A. Yes, sir.

Q. And you have gone down on the east side?

A. Yes, sir.

Q. Now, Mr. Young wanted to know what times those were.

A. All times, day and night both.

Q. Has there been any difficulty about making such a passage?

A. I have found none.

Q. Have you passed other tugs and tows in there? [608]

A. Yes, sir.

Q. Likewise port to port? A. Yes, sir.

Q. Besides the Western Transportation Company's tugs?

A. Yes, sir. I think I have passed more tows with barges port to port than I have starboard to starboard since the accident.

Q. Before the accident—I am not speaking of Western Transportation Company, now, but tugs and barges generally—how has the passage been?

(Testimony of L. O. Hosford.)

A. I would say a large majority have passed starboard to starboard.

Q. And some the other way?

A. Occasionally, yes.

Q. I think it is clear, but when you made these passages that you have just talked about, you were piloting an ocean steamer going down, were you not?

A. Yes, sir.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. Captain Hosford, you testified that subsequent to the time of this accident, you had seen boats of the Western Transportation Company passing port to port at Post Office Bar.

A. I have passed Western Transportation Company boats port to port since the accident.

Q. At Post Office Bar? [609]

A. Yes, sir.

Q. Now, when was the first occasion when you did that?

A. I don't recall the exact dates, Mr. Young. I have passed a number of them. I think more—we have passed more than I have the other way.

Q. What is the first boat that you did pass?

A. I don't recall the first one. I have passed the Barry K since that port to port and the Claire.

Q. At Post Office Bar?

A. Yes, sir, with barges.

Q. With barges? A. Yes, sir.

(Testimony of L. O. Hosford.)

Q. Was that daytime or night? A. Both.

Q. Both times? A. Yes, sir.

Q. And do you remember when those times were?

A. No. I can't recall the dates.

Q. Do you know any other boats of the Western Transportation Company that you have passed at Post Office Bar port to port since the accident?

A. Pardon?

(The last question was read by the reporter.)

A. Yes. I have passed the Patricia with barges.

Q. Any other boat? [610]

A. I can't recall any other, no.

Q. What boats have you been on at the times that you have been making these passages?

A. I can't say that. I didn't make a log of it or a note of it.

Q. Were you a pilot on the boat that was doing the passing? A. Yes, sir.

Q. Were they American-Hawaiian ships?

A. Yes, sir.

Q. Is that as closely as you can get to the identity of the boats and the times when you made these passages port to port?

A. I didn't pay any attention, Mr. Young.

Q. You didn't pay any attention to it?

A. That is, to the time and date. I didn't make a note of it.

Q. Do you know who the pilots were on those boats of the Western Transportation Company?

(Testimony of L. O. Hosford.)

A. No, sir; I do not. I do remember two weeks ago passing the tug Melville right in that same spot where the accident occurred port to port with three loaded sawdust barges.

Q. The port tug Melville?

A. Yes, sir.

Q. Who owns the Tug Melville?

A. Knappton Towboat Company.

Q. Prior to the time of this accident, what do you say was the practice for river boats in making passages at Post Office Bar in passing ocean-going ships? [611]

A. I would say the majority of them passed starboard to starboard.

Q. Starboard to starboard. That is to say, the majority of them stayed over on the east side?

A. Held the east side; yes, sir.

Q. Why did they do that, do you know?

A. Well, it is easier going over there, and there is a little more room if a fellow gets clear over against the east bank. He knows that a ship can't get over there and hit him.

Q. In other words, there is no possibility of a collision if he is over there far enough. Is not that true?

A. If he is far enough over, that is true.

Q. Because the ocean-going ship would run aground first? A. Yes.

Q. You testified that you have handled quite a few towboats. Now, for whom have you handled any towboats?

(Testimony of L. O. Hosford.)

A. Well, I worked quite a lot for the Western Transportation Company.

Q. During what period of time?

A. Well, I worked a year or more back in 1914 and '15—or '13 and '14, I guess it was; in that vicinity.

Q. Were you handling towboats for them then?

A. Yes, sir.

Q. In '13 and '14? A. Yes, sir.

Q. What other time?

A. And then I was two or three different times. I worked for them in 1937. [612]

Q. How long? A. A couple of months.

Q. For a couple of months in '37?

A. I think it was. And I worked in '36 or so for about the same length of time.

Q. Well, now, for whom besides Western Transportation Company have you ever operated towboats? A. Shaver Forwarding Company.

Q. When did you work for them?

A. I think it was '36.

Q. How long?

A. Oh, a short while. A month, or about two months.

Q. Now, for what other companies have you operated towboats?

A. Well, I worked for Drake O'Reilly. He towed barges altogether. That is about all of the companies that I worked for as Master or pilot.

Q. Now, out of your total experience on the

(Testimony of L. O. Hosford.)

river, adding it all up together, how many months or years would you say you have actually piloted towboats? A. Two years.

Q. Two years. And you have been on the river altogether how long?

A. About thirty—since 1906.

Q. Since 1906. And all of the time then except those two years, what sort of boats were you operating?

A. Freight and passenger boats. [613]

Q. The problems of operating freight and passenger boats are somewhat different from towboats with barges, are they not? A. Yes, indeed.

Q. You have testified that there is an advantage in this law of requiring the passage always to be on the right because pilots who are coming up and down the stream always know what to expect at any particular place. Is that right?

A. Yes, sir.

Q. However, if there is a custom that has existed for many years at any particular place on the river to the effect that the passage would be starboard to starboard instead of port to port, there is no hardship on the pilots as to that particular place, is there?

Mr. Wood: I object to the question. It is well settled that a custom cannot override the laws; probably twenty decisions on that.

Mr. Young: That is not correct, your Honor, particularly if the custom is based upon factors of

(Testimony of L. O. Hosford.)

safety and practicality. We have already put on testimony in that regard, and this is cross examination of this witness at this time.

The Court: Do you expect to have opposing authority?

Mr. Young: Yes, your Honor.

The Court: He may answer, subject to the objection.

(The last question was read by the reporter.)

Mr. Wood: I also object to that as argumentative.

Mr. Young: I call the Court's attention to the fact that [614] counsel, himself, asked the question as to whether having the law provide that the passage shall always be port to port is practical. This is simply asking the question in the other form as to starboard to starboard.

The Court: Answer, Captain.

A. If the pilot knew definitely that the towboat was out of the channel why there would be no hardship on him passing starboard to starboard, no.

Mr. Young: Q. As a matter of fact, the pilots of ocean-going ships would be very happy to have all of the towboats out of the channel, would they not? A. Yes, indeed, they would.

Q. And the reason for that is that there is no possibility then of a collision. Is not that true?

A. Yes, sir.

Q. As a matter of fact, is not that one of the

(Testimony of L. O. Hosford.)

circumstances that has caused the pilots of river boats to use the east side of the river down past Post Office Bar?

A. That used to be in effect when the channel was narrower, yes.

Q. It is still in effect, is it not?

A. I wouldn't say that it was, no.

Q. You would not say that it was?

A. There is practically as many go the other way as there is the east side.

Q. And how long has that been true? [615]

A. Well, it has been mostly true since this accident. It has made a very mean condition in that bend since this accident, because you don't know where they are going, now.

The Court: What was your last word or two?

A. You don't know where they are going, now. Some of them pass you to port and some to starboard. It has created a very difficult situation.

Mr. Young: Q. In other words, if they would all stick to the old custom, there would not be any such problem?

A. One or the other, if they would stand by the rule.

Q. One or the other. Either port to port or starboard to starboard. Is that right?

A. Yes, sir.

Mr. Young: If the Court please, I do not want to have this witness dismissed completely from the trial, here. There may be some further questions

I should like to ask him on cross examination, but I have got to do some checking before I can do that.

The Court: Do you want to defer your redirect, then, Mr. Wood?

Mr. Wood: Yes, I think so.

The Court: Just what is your position going to be as to the effect of custom on the rule,—step down, Captain—Mr. Young? That it abrogated the rule?

(Witness withdrawn.) [616]

Mr. Young: In the first place, your Honor, the rule expressly provides that the passage may be other than port to port if it is neither safe nor practicable to pass port to port. We have already put on a very substantial amount of testimony on that point, that it is neither safe nor practicable under the circumstances present at this place for a port to port passage to be made, and that it is neither safe nor practicable for the river boats to use the west side of the stream. Now, if your Honor believes that testimony, then there is no question of a violation of the rule involved. We fall directly under the rule, because the rule expressly says that you will pass port to port when safe and practicable, but if it is neither safe nor practicable then you do something else, of course,—in this case pass starboard to starboard. Now, that is the first point.

The second point is that of a long-established custom as to the use of the river by river boats on

the east side being well known to all of the pilots in this particular river, and that, that being the situation, when the Pennsylvanian met the Barry K at the time this collision occurred, the pilot of the Pennsylvanian was charged with knowledge of the existence of that custom and was not to be met by any surprise when he found the Barry K over on the east side of the stream.

The Court: He says he did not know where she was.

Mr. Young: Well, that is a matter for your Honor to pass upon. He said that he did not know where she was, but the fact of the [617] matter is he has placed there on the map indicating where she was. If your Honor believes that is where he saw her, it is perfectly obvious she was over on the east side. Moreover, our testimony has been very definitely that we had ample lights on the Barry K, that we had lights on the forward corners of the barges, and all of those are circumstances for your Honor to give consideration to in determining the exact position of the Barry K.

The Court: Well, at a mile, conceding the lights for the purpose of the argument, would that place her form at one side or the other to him?

Mr. Young: Would you state that again?

The Court: At a mile's distance, would he know which side she was on?

Mr. Young: A man who has been piloting on the river for years should know where the boat is when he is looking at the lights. That is correct, your Honor.

Mr. Wood: May I interject that Captain Reed said he could not tell which side the other ship was situated on?

Mr. Young: Captain Reed testified that the Pennsylvanian was on the Post Office Range and that she left the Post Office Range at a point earlier than ships ordinarily did leave the Post Office Range when she was coming downstream.

The Court: Earlier than he expected her to?

Mr. Young: That is right.

Mr. Wood: He also said he could not tell. [618]

Mr. Young: He had to see her in order to testify about that, your Honor.

The Court: You did not finish your statement about the custom.

Mr. Young: I thought I had, your Honor. I stated in the first place that there is evidence in this case from which your Honor can probably conclude that it was neither safe nor practicable for the river boats to go up the east side of the river.

The Court: What is your alternative position?

Mr. Young: The alternative position is, your Honor, that if the custom existed and the custom was well established and was known generally throughout this territory by pilots, then when a pilot of an ocean-going ship going downstream saw what he, as Captain Norberg, admitted was a river boat coming upstream, he would be charged with knowledge of the fact that she would be over on the east side of the stream because that would be in accordance with the custom, and he should govern himself accordingly.

Mr. Wood: On that point I will say, your Honor—had your Honor something else?

Mr. Young: Your Honor, earlier in the day, here, you asked me some inquiry about whether the last clear chance had application in the case. In this particular case, here, without conceding there was any question of our being at a place where we had no right to be—even assuming that we were in a place where we did not have a right to be—if, nevertheless, we were actually seen by the other vessel and they had opportunity to avoid a collision, it [619] would necessarily be their duty to do so.

The Court: Have you pleaded your alternative position?

Mr. Young: Yes, I think so, your Honor. Complete failure to give any heed to the several whistles of the Barry K for starboard passage, the danger signals, the crossing of our first starboard passing whistle, that the Pennsylvanian either saw or ought to have seen the position of the Barry K but failed to take proper steps to avoid a collision, she failed to change her course to port so as to avoid a collision after sighting the Barry K, she changed her course to starboard and continued through to the moment of the collision—that is precisely the testimony of Captain Reed, which was corroborated by the captain of the tug Cruiser. She failed while yet a safe distance from the Barry K to slow down. She continued at an immoderate and unreasonable speed toward the Barry K. At all

times after the two vessels sighted each other and up to the moment of the actual collision, there was adequate space in the ship's channel to the west of the Barry K for the passage of the Pennsylvanian and no available space to the east of the Barry K for such passage, and the Pennsylvanian nevertheless failed to take advantage of such situation. She took no timely steps to avoid the collision.

The Court: No reference to custom, there.

Mr. Young: Oh, the custom is prior to this, your Honor. We have already stated and set out at some length the existence of the custom in a prior article. Article VI: "At said time and [620] during all years preceding, while river boats had been operating upon said river, it was unsafe and impracticable for river tugs such as the 'Barry K', particularly with barges in tow, to proceed upstream at said place on the west side of the river. Said 'Barry K' and tow was then proceeding up the east side of said river in accord with safety requirements and with the uniform practice of river boats with barges, which practice had existed for more than forty years prior thereto. Said practice and the basis therefor was well known to all Willamette River pilots." It used the word "practice" instead of "custom" is all.

The Court: You have a ground of negligence there, that the Pennsylvanian failed to change her course to port?

Mr. Young: Yes, that is right.

The Court: It was testified to before me in the

Constance Chandler case that a steamer would not answer to her rudder in making a change of course for two or three ship lengths.

Mr. Young: Well, we have not completed the testimony in this case, your Honor. That is one point on which there is going to be some further testimony, so far as the Libelant is concerned.

The Court: Normally part of your case in chief, is it not?

Mr. Young: No, I think the pilot made some comment to the effect that with the Pennsylvanian having turned to the right he could not get it back again on a course over to the left within the distance that was then available. I think we have a right to meet that testimony? [621]

The Court: Normally, that being one of your grounds of negligence, it would be part of your case in chief.

Mr. Young: Well, if the Court please, the testimony on our part shows that the first whistle which was given by the Barry K was a starboard passing whistle and that right after that the Pennsylvanian, instead of complying with the starboard passing whistle, blew a port passing whistle and itself proceeded over toward the right-side of the stream. In other words, that is the starting place.

The Court: And you charge that she should have turned to the left?

Mr. Young: Why, she should have turned to the left at this time. It is all a question of point of time when she was doing her turning.

The Court: But you have no testimony in here as to what movement she could have made to the left.

Mr. Young: As to what maneuver she could have made?

The Court: Yes.

Mr. Young: Well, if she did make a maneuver to the right, she could have made a maneuver to the left instead, in response to our signal. I do not think it would take expert testimony on that point. At the time that signal was blown, they were a mile apart, practically. The only controversy that has arisen, when they got much closer together than our testimony indicates then there was opportunity left for the Pennsylvanian to swing around to the left instead of continuing on to the right.

The Court: Suppose I thought that nearly everybody here, nearly [622] all of the principal witnesses were telling the truth, or at least were trying to, would not that narrow the controversy pretty closely, then?

Mr. Young: All of the principal witnesses were telling the truth?

The Court: Yes. For instance, that I thought that Captain Reed was telling the truth when he said he blew two whistles.

Mr. Young: Yes.

The Court: And that I thought all three of the Pennsylvanian officers were telling the truth when they said they heard only one.

Mr. Young: That is very easily answered, your

Honor, very easily answered. The point is that a person who says that he did not hear something, that testimony never carries the weight of the testimony of a man who says "I was there and I heard it." In other words, you have a case of negative testimony against positive, and both sides may be honest.

The Court: If you are a trial lawyer it will always come out. That is what I call legalistic reasons.

Mr. Young: Your Honor might call it legalistic, but, as a matter of fact, the Supreme Court of Oregon in a railroad case has very recently dealt at great length on that same subject.

The Court: Fortunately, I am not bound by that.

Mr. Young: That is true. I simply cite that as very substantial authority for the contention that I am making.

The Court: Is there any testimony in here about the depth of the water where the collision occurred? I do not suppose there was [623] opportunity to take any soundings at a time like that, nor did anybody.

Mr. Young: The testimony is that it is outside of the 35-foot channel.

The Court: Well, in their judgment.

Mr. Young: It was approximately 200 feet from the east shore, and there is testimony that the 35-foot channel starts about 400 feet out from the east

shore, and then, generally, that the water shallows up until you get to the shore.

The Court: What is your view about what the case shows as to depth of water where the accident occurred, as far as it has gone, Mr. Wood?

Mr. Wood: Mine?

The Court: Yes.

Mr. Wood: Why, I think it is marked on the chart. It speaks for itself. Captain Reed, himself, puts it on the edge of the 35-foot channel. If anything, it is a little bit inside the 35-foot channel.

Mr. Young: Well, if the Court please, Captain Reed put a red cross mark right at the point which is alongside of number 27. It is right on the edge of where the dividing line between the 30-foot channel and the shallow water is, and no human being could put the exact number of inches or feet within the place where this collision occurred.

The Court: That is what I think about all of the marks on that map. [624]

Mr. Young: Certainly. All of them are relative, of course.

The Court: Very relative. They are almost in the relations class. So there is no testimony in here as to what the depth of the water is. Nobody took the depth of the water, did they?

Mr. Wood: Nobody took soundings.

Mr. Young: Nobody took a sounding at the place, if that is what your Honor means.

The Court: That is what I mean. What else

could I mean? Are you going to bring the Inspectors here, or any of them here, as expert witnesses on practicability and safety?

Mr. Wood: No, I am only going to bring one of the Inspectors here in support of the allegation in my cross libel and answer that previous to this time they had already condemned towboats for coming up on the east side bank and that was a ruling that all pilots are bound to take cognizance of. I am going to bring a man to testify to that fact.

The Court: One on the Inspectors?

Mr. Wood: Yes, your Honor.

The Court: In effect, you are going to offer him as an expert witness?

Mr. Wood: I merely offer him to testify to the fact of the ruling that his office made.

The Court: But, in effect, he would not have made that ruling if, in his expert opinion, he had not felt that it was safe and practicable to operate port to port. So in effect you are offering [625] him as an expert witness to that effect. What is your position on that, Mr. Young?

Mr. Young: As to that, your Honor, when I read the cross libel of the Respondents in this case, I immediately communicated with the office of the Inspectors and was informed by Mr. Hill that he would check his records to see if there was any such case. He did so and he said he was unable to find any record of such ruling. I do not know what counsel will produce.

The Court: He is going to tell you now.

Mr. Wood: It is the case of two small towboats, each with tow, and one was the Modoc and the other was the Tidepoint, and I think it was the Modoc that was coming up and blew for a starboard passage, which the other vessel did not hear and therefore did not answer, and a collision occurred, and the Inspectors held the Modoc wrong for coming up on the wrong-hand side.

The Court: How long ago?

Mr. Wood: I think it was in '38, I believe it was. As a matter of fact, the Inspectors' opinion—there has already been evidence of their decision in this case, which has been offered in evidence.

Mr. Young: Well, if the Court please, the courts have expressly held that is not under any circumstance binding upon this court.

The Court: I have not held anything else.

Mr. Young: It is not bind——

The Court: None of this expert testimony is binding.

Mr. Young: I mean the question of a ruling of the Inspector [626] in some prior case is not in any event binding upon this court, because even Inspectors might be wrong. I want to see that decision, however.

The Court: There is no reason why the Inspectors cannot offer themselves here or be called here as expert witnesses.

Mr. Young: No.

The Court: And the practical difficulty you pre-

sent me with, Mr. Young, if Mr. Wood carries out his declared intentions, here, is that you are asking me on a highly controversial technical question involving safety to lives and property to take a position adverse to the executive and disciplinary officers of the Government.

Mr. Young: That is exactly your prerogative and that is precisely your duty, your Honor. If you believe he is wrong it is your duty to say so and I will at the proper time produce authority to that effect.

The Court: Well, I do not have any doubt as to that, that I could hold here that the President was wrong in declaring war, if that should come about, but I certainly would not do it, and I just restate to you my feeling about a question of this kind where life and property is so seriously involved, when you ask me to hold here on the basic question of practicability and safety contrary to the opinions and rulings of the executive and disciplinary part of the Government you are asking me to do a pretty serious thing.

Mr. Young: That is the duty of the Court, nevertheless, your [627] Honor, and I might call this to your attention in addition. Your Honor asked Mr. Wood a question one day which I think had some considerable significance. You asked him whether or not the Inspector had the power to punish anyone for violating the Pilot Rules even though there were no actual injury to anyone, and counsel's answer to that was "Yes." Now, the interesting cir-

cumstance is that there is evidence in this case that this custom to which we have referred has existed for the last 45 years. If you were going to punish everyone who had complied with this custom during the last 45 years, you would have all the pilots in the river in jail and they would have been there an indefinite length of time, and yet the most that counsel has even claimed for it in this case is that he found some one decision in 1938 where there was a holding that they were not to pass port to port. By the way, was that at Post Office Bar?

Mr. Wood: Yes.

Mr. Young: I want to see that decision. The Inspector informed me he had no such decision.

The Court: We will adjourn until 8 o'clock tomorrow morning.

(Thereupon, at 12:50 o'clock P. M., Court was adjourned until tomorrow, Tuesday, July 22, 1941, at 8 o'clock A. M.) [628]

Tuesday, July 22, 1941, at 8 o'clock A.M., pursuant to adjournment, the following further proceedings were had:

The Court: Mr. Maxwell and Mr. Wood, Jr., I assume that you are the lawyers on each side, anyhow the younger lawyers. There is a late article in 53 Harvard Law Review—that is June, 1940,—at page 1239 and page 1251, dealing with last clear chance in admiralty in relation to the doctrine of

comparative negligence. It is a rather interesting discussion.

Mr. Young: If the Court please, yesterday your Honor was inquiring of me with respect to our theory on the matter of custom. I wanted this morning to amplify one of the answers which I made. It is our position that with respect to whether or not it is was either safe or practicable for river boats to use the west side of the river that depends not necessarily upon conditions that may exist at any particular moment of time, but, rather, upon conditions which are changing from time to time and over long periods; that is to say, conditions with respect to the matter of the direction of the wind, its violence and velocity, the amount of current in the stream, stormy weather, day, night, the number of vessels which may be present or about Post Office Bar at the time that any particular river boat or tug is about to pass, and so forth.

Mr. Wood: You mean depends on the circumstances at the time of the passage?

Mr. Young: No, I am stating exactly the opposite, that it does [629] not necessarily depend upon that. Conditions at the time of the passage may be peculiarly dangerous at that particular point of time, but the custom upon which we rely and which is built up upon factors of safety and practicality is based upon these changing conditions over periods of time extending back as far as 40 to 45 years ago. Now, in view of the circumstance that the amount of danger which might exist to any particular river

boat with its tow in passing Post Office Bar might vary from time to time. In the interest of uniformity the custom has grown up toward the end that there will not be chaos in the matter as to which side of the river the river boats may be expected to be upon. In other words, the long series of circumstances based upon factors of safety and of practicality have produced this uniformity in the practice to which I refer.

Now, another point, your Honor. Yesterday upon the witness stand Captain Hosford testified to an alleged change in the practice by the Western Transportation Company boats since the time of the Pennsylvanian accident, and in cross examining him I was able only to ascertain the names of certain boats which he claimed were involved, namely, the Barry K., the Claire, and the Patricia. Since yesterday I have been checking up upon that matter, and in view of Captain Hosford's indefiniteness as to the particular time and place when he claims that these boats were using the west side of the river instead of the east side it will become necessary for us to call in all of the pilots and all of the Masters on those [630] three boats. At my present stage of investigation it appears that there will be about nine involved, and to bring them in here is rather crippling to the Company, but nevertheless if they can all be brought at about the same time it would be a matter of great convenience. I should like, therefore, to inquire at this time as to whether opposing counsel will expect to consume at least the balance of

today toward the end that I might perhaps assume that tomorrow morning would be the time to bring those witnesses in. I cannot bring them on very short notice.

Mr. Wood: I doubt, your Honor, whether we will consume the rest of the morning, because there is one witness of mine that I have not got and I do not know whether I can lay my hands on him or not, but of course if we do not consume the rest of the day I should not object to an adjournment until tomorrow morning and let him bring his men in.

Mr. Young: As a matter of fact, your Honor, it would almost necessitate that I plan on tomorrow morning, because so many men cannot be brought in just a few minutes of time. I might say that their testimony in each instance will be short, however, so that it will not consume a great deal of the Court's time.

The Court: You have other rebuttal testimony?

Mr. Young: Well, I have some, yes, your Honor. I had understood from the way counsel spoke yesterday that he was going to consume this morning, however, and that I would not probably reach rebuttal before tomorrow morning. [631]

The Court: You plan to bring your people in and complete your testimony tomorrow morning. I hope also the arguments tomorrow morning.

Mr. Young: Very well.

The Court: Does anyone have here that maritime case about the admissibility of the report of Inspectors, or can I send to the library and get it?

Mr. Erskine B. Wood: I believe we have cases here.

Mr. Maxwell: That has a Federal citation.

The Court: I do not want you to take a lot of time. Maybe they have the Federal citation.

Mr. Maxwell: 60 Federal 2d 543.

Mr. Young: On that same subject, your Honor, I might at this time refer you to the case of Steamboat Charles Moran, 115 U. S. page 78, '29 law edition 516.

The Court: Any others besides 115 U. S.?

Mr. Young: That is the only United States Supreme Court case. But there is another one which I have here: Marcus Fegan against Lykes Brothers Steamship Company, 1940 A. M. C. 993.

The Court: We do not have A. M. C. I wish you would cite us Federal.

Mr. Young: Well, this case, your Honor, is not in the Federal reports. It is a Louisiana Court of Appeals.

The Court: Does the Multnomah Law Library have the A. M. C.?

Mr. Young: We can bring it over from the office, your Honor. [632]

The Court: I want it this morning, so I will send Mr. Bragg over. 1940 A. M. C.?

Mr. Young: 1940 A. M. C. 993.

The Court: That is probably in the advance sheets yet.

Mr. Young: Yes, your Honor. If the Court please, may I make one further suggestion? Your

Honor has stated that you would like to have the arguments concluded tomorrow. It has occurred to me that in view of the fact that a number of legal questions have been raised and the fact that the testimony is rather long and involved that it might be more helpful to your Honor if we immediately filed briefs and then present the oral argument as soon as the briefs are before your Honor.

The Court: Mr. Wood said it was his custom and his preference to argue the facts and perhaps the law also immediately after the case, so that——

Mr. Young: It was my suggestion to do the other way. I am afraid your Honor will have to settle that way.

Mr. Wood: I would rather do it that way. I think we should talk it over while it is fresh in our minds.

Mr. Young: I will be governed, of course, by whatever your Honor decides.

The Court: Be prepared to argue.

Mr. Young: I should like to call Mr. Hosford for one question. [633]

L. O. HOSFORD

resumed the stand as a witness in behalf of the Respondents and further testified as follows:

Further Cross Examination

By Mr. Young:

Q. You testified yesterday that in the year 1927,

(Testimony of L. O. Hosford.)

I believe, you worked a couple of months for the Western Transportation Company.

A. Yes, sir.

Q. And what boats were you operating at that time? A. I was on the Annie Cummings.

Q. That was a stern-wheel river boat?

A. Yes, sir.

Q. Is that the only boat that you were piloting for the Western Transportation at that time?

A. At that time, I believe. I was on the Burton another time, but I don't believe I was at that special time.

Q. Was your work that of a pilot?

A. Pilot, yes.

Q. And at that particular time you had occasion to go past Post Office Bar? A. Yes.

Q. Which side of the stream did you use?

A. I think I used the east channel altogether.

Q. You used the east channel altogether?

A. Yes.

Q. And did you use the east channel altogether irrespective of [634] whether you were pushing barges or pulling log rafts?

A. I think so, yes. I don't think I used the west channel at all.

Q. And in using the east channel you used it going both directions—that is, either upstream or downstream? A. Yes.

Mr. Young: That was all.

(Testimony of L. O. Hosford.)

Redirect Examination

By Mr. Wood:

Q. Was it more convenient for you to do it that way?

A. Yes, it is more convenient by getting out of the channel on that side; you have more room.

Q. Slacker water, was it not?

A. I don't recall, Mr. Wood, the condition of the river at that time. It was in the late summer and fall. I don't think if it were looked up there——

Q. It would be a shorter distance for you?

A. Yes, it is shorter.

Q. You were cutting corners, going that way, were you not? A. Yes.

Q. Did the Company have a marine superintendent? Did the Western Transportation Company at that time have any general boss over you?

A. Yes. Mr. Confer.

Q. I was wondering whether they had given any general instructions to the pilots who were working for them to favor the slacker, shoaler water, take the shorter cuts, and take advantages of that kind.

[635]

A. I never heard of any. It is generally left to the Master in the discretion of the crew of the vessel.

Mr. Young: Yes.

Is that all?

(Testimony of L. O. Hosford.)

Recross Examination

By Mr. Young:

Q. Well, then Mr. Hosford, in using the east side of the river you were doing so under your own discretion at that time. Is that right?

A. Yes.

Mr. Young: That is all.

The Court: All right, Captain. Step down.

Mr. Wood: No, I have another question on another subject.

Redirect Examination

By Mr. Wood:

Q. Captain Hosford, earlier in this case mention was made by opposing counsel of the collision between the Welsh Prince and the Iowan. Do you recall that?

A. Yes, sir.

Q. Was that collision one where one steamer blew two blasts and attempted to pass to the left in a narrow channel?

Mr. Young: If the Court please, I object to that question unless this witness was present and observed the accident.

The Court: I guess that will come out.

Mr. Young: Pardon? [636]

Mr. Wood: Well, no. They brought it up themselves. This case, I should like——

Mr. Young: Well, if the Court please, the only occasion——

The Court: What do you know about it, Captain?

A. Only what I have read and heard?

(Testimony of L. O. Hosford.)

The Court: He is not qualified.

Mr. Wood: It is common knowledge on the river.

Mr. Young: Common knowledge——

A. I wasn't present.

The Court: I ruled, Mr. Young.

Mr. Wood: Q. How about the case of the Feltra and the Luckenbach not so many years ago? Do you know about that?

Mr. Young: The same objection.

The Court: The same ruling.

Mr. Wood: Q. You do know that both the Welsh Prince and the Feltra were sunk, do you not? A. Yes, sir.

Mr. Young: I move to strike out the witness's answer, your Honor.

The Court: Motion denied.

A. I saw them.

Mr. Wood: Q. About how long ago was it that the United States Engineers widened the channel at Post Office Bar from its former width of, I think, 500 feet to its present width of between seven and eight hundred feet?

A. They completed it two years ago this fall.

Mr. Wood: That is all. [637]

Recross Examination

By Mr. Young:

Q. Is it not a fact that at the present time it is only the 35-foot channel at that point that is being maintained by the United States Engineers?

(Testimony of L. O. Hosford.)

A. I couldn't answer that, Mr. Young. I don't know.

Mr. Young: That is all.

(Witness excused.)

Mr. Wood: I believe you reserved the right to put Captain Norberg back on the stand. Do you wish to do that now?

Mr. Young: I do not recall as to Captain Norberg. It was Captain Hosford.

Mr. Wood: All right. I will recall Captain Norberg.

JOHN NORBERG

resumed the stand as a witness in behalf of the Respondents and further testified as follows:

Further Direct Examination

By Mr. Wood: [638]

Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the Barry "K", you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal——

Q. What is the correct testimony; what are the facts about that? When you saw the green light of

(Testimony of John Norberg.)

the Barry "K" first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the Barry "K", what did you do with your engines?

A. Full astern.

Q. Did you make an official report to the United States Inspectors along with Captain Vaux about this collision?

A. Yes, sir.

Q. And since you gave your previous testimony have you refreshed your memory by that report?

A. I did.

Q. And does that report state the facts as you have now stated them?

A. Yes. [639]

Q. Have you got that report with you?

A. I have.

Q. I will ask you to produce it.

A. I have got it in my coat pocket there.

The Court: Mr. Wood, Jr., maybe you will want to look at this U. S.—the question may come up during the morning.

Mr. Wood: Q. Is that the report?

A. Yes, this is.

Q. Is that the copy of the one that you sent in to the Inspectors?

A. Yes.

Q. You signed it?

A. Yes.

Mr. Wood: This, your Honor, is a copy of the same report which was offered yesterday and on

(Testimony of John Norberg.)

which your Honor reserved ruling in connection with Captain Vaux' testimony. This was the one they both signed. In fact, their signatures are on this, and in view of the witness's present testimony, I think I will offer it.

Mr. Young: May I see it, if you please? This is the one I was reading yesterday? That is objected to upon the ground that it is a self-serving document, that it is hearsay, that it is not admissible in favor of the party offering it, in this instance the respondent, American-Hawaiian.

The Court: I will reserve ruling until the argument. [640]

(The document, so offered, was marked Respondents' Exhibit 12 for identification.)

(Testimony of John Norberg.)

RESPONDENTS' EXHIBIT No. 12 FOR
IDENTIFICATION

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY

Operating Department
Portland Trust & Saving Bank
Box 1982

Cable and Radio

Address

Amhawaii

M.S.

S.S. Pennsylvanian Voy. 87 W.B.

Written at Portland, Oregon

Date February 1, 1941

(In Reply to Operating

Dept. Letter, File No.)

Subject Collision

Bureau of Marine Inspection & Navigation

Captain Arthur Joachims, Local Inspector,

Portland, Oregon.

Dear Sir:

I regret to report a collision between Western Transportation Barge #22, being towed by tugboat 'Barry K' at 12:55 A.M. this day Feb. 1, 1941 at Post Office Lower Light in the Willamette River. The Pennsylvanian was considerably damaged about the bows and I understand the barge and her cargo is also damaged. There were no personal in-

(Testimony of John Norberg.)

juries and both my vessel and the barge were able to reach this port and are now here.

The Pennsylvanian Capt. Earle B. Vaux, Master and Pilot John Norberg left Pier 'A' Portland at 12:03 A.M. this day bound for Astoria. Weather overcast—visibility good—calm and smooth, tide ebbing. Vessel proceeded down river passing through R.R. Bridge at slow speed. At 12:39 engine at half speed passing under St. Johns Bridge. At 12:50 A.M. Full ahead sighted a towboat approximately half a point on port bow showing regulation towing lights (white) and red side light with brilliant deck lights. About a minute later the towboat blew one blast on her whistle, which was understood by Pilot Norberg and by me to be a passing signal and that he (the towboat) was passing 'port to port'. This vessel answered with one blast, and continued down stream well on her right-hand side of the channel. As we approached closer, the 'Barry K', which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed. The bridge bell-book entry for this is at 12:54 A.M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger signal, and we

(Testimony of John Norberg.)

immediately put our engines full astern and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern. This is recorded in our bell-book at 12.55 A.M., which, again, is only to the nearest minute. After a short period going with engines full astern and rudder hard right, we collided with Barge #22 of the Western Transportation Company. Though the collision is recorded in the bridge bell-book, to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable.

Called through megaphone to tugboat asking if he was all right or needed assistance. He answered he had a broken oil-line. At about 1.10 A.M. tugboat Cruiser bound up river went to the Barry K and then came alongside to pick up the two barges that were drifting. Asked Cruiser if he needed any assistance and if anyone aboard barges, to which he replied, 'No'.

Bilges and fore peak tank showed no change and at 1.23 A.M. proceeded toward Astoria. At 1.52 A.M. repeated soundings showed that vessel was making water in the fore peak tank (used for fresh water). Stop-turned around and proceeded to return to Portland and began pumping from fore peak. Vessel docked Portland 4.10 A.M. this day.

In my own statement and firm belief the towboat Barry K and her tow of two barges failed to keep

(Testimony of John Norberg.)

her right side of channel after blowing one blast;
also tow improperly and inadequately lighted.

Respectfully submitted,

E. B. VAUX

Master

S.S. Pennsylvanian

I concur in the foregoing statement.

JOHN NORBERG

Pilot.

[Endorsed]: Filed Jul. 23, 1941.

Mr. Young: If your Honor will pardon us just a minute, I want to check this witness's testimony in the transcript.

The Court: You will need a little more time than that, I judge.

Mr. Young: If the Court please——

The Court: What does the bell book show as to the time when the engines were put at half speed and stopped?

Mr. Wood: It is 12:54, half speed, stop.

The Court: Q. So, Captain, the accident occurred to the nearest minute at 12:55?

A. Yes, sir.

Q. And at 12:54 to the nearest minute, which would mean making all allowances, not more than two minutes—or less than two minutes before was when you first saw the green light?

A. Just about. Less than two minutes.

(Testimony of John Norberg.)

Mr. Wood: You understand, your Honor, that in these bell books these “stops” and “go ahead” are in symbols; they are not written out; they have a quick symbol?

The Court: I am glad to have you tell me what they mean.

Mr. Young: That is why I went over those yesterday with the other witness, your Honor.

The Court: We are beginning to get down to cases, now, gentlemen. The pilot first apparently felt that the situation [641] called for action on his part at 12:54, to the nearest minute, when he saw the red light change to the green.

Mr. Wood: That is when it was “half speed” and “stop.”

The Court: Half speed and stop; so that the events thereafter up to and including the collision transpired within less than two minutes.

Mr. Wood: That is right.

Cross Examination

By Mr. Young:

Q. Captain, does this bell book show or say anything with reference to your seeing the green light or red light, either one?

A. No, it doesn't show here.

Q. Well, all you see from the bell book is, first of all you see 12:50. What time is that; what happened then? A. That is full speed.

Q. What is that? A. Full speed.

Q. That was full speed. Now, at 12:54, what next happened? A. Half speed, stop.

(Testimony of John Norberg.)

Q. Half speed and stop? A. Yes.

Q. And those came close together?

A. One bell after the other.

Q. One right after the other. The reason why you did any particular thing at that time does not appear in the bell book, [642] does it?

A. No. It was just a precaution to stop at that time, saw a green light; no apparent danger at that time.

Redirect Examination

By Mr. Wood:

Q. You say there was no danger at that time?

A. At that time there was no danger.

Q. But you stopped out of precaution?

A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [643]

The Court: Do you reserve the right to recall the Captain after you have examined the transcript?

Mr. Young: If your Honor please.

Mr. Wood: If your Honor please, I asked Mr. Wells, the United States Weather Bureau man, to come and testify this morning about the wind velocity on the night of this collision, and he informed me that he had a regular Government form of certificate which they always used, and he supplied me with this and offered to come if counsel and the Court required it, but there is the certificate which I offer in evidence.

Mr. Young: This is objected to, your Honor, upon the ground that it purports to show the wind velocity at Portland, Oregon, and before it would be admissible with respect to the condition which existed at Post Office Bar it would have to appear that this is accurate as to Post Office Bar. The Court will take judicial notice of the fact, however, that a number of miles intervene between the place where the accident happened and the place where this weather record is kept by the United States Bureau. I assume it is kept at the Customs House in the City of Portland.

The Court: Which is about how many miles from Post Office Bar? Ten to fifteen?

Mr. Young: I should imagine ten miles, at least.

The Court: It is admitted.

What does it show?

Mr. Wood: It shows the wind velocity was a breeze from the East of seven miles an hour. [644]

(The certificate, so offered, was received in evidence and marked Respondents' Exhibit 13.)

RESPONDENTS' EXHIBIT No. 13

UNITED STATES OF AMERICA

United States Department of Agriculture
Weather Bureau

Station Portland, Oregon Date July 21, 1941

As the custodian of the records of the U. S. Weather Bureau, filed at Portland, Oregon, I here-

by certify that it appears from such records that at Portland, Oregon, the wind movement from 12:00 midnight to 1:00 a.m., February 1, 1941, was at the rate of 7 miles per hour from the east.

EDWARD L. WELLS

Meteorologist in Charge.

[Endorsed]: Filed Jul. 23, 1941.

JAMES A. HAZELWOOD

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hazelwood, you are in the employ of the American-Hawaiian Steamship Company, are you not?

A. Yes, sir; 25 years.

Q. What is your present employment?

A. I am Superintendent of Stevedores and Operation on the Columbia River.

Q. And have you been Master of ships?

A. Twelve years with American-Hawaiian.

Q. Actually operating as a Master?

A. Yes, sir.

Q. In what trades?

A. Intercoastal trade between Puget Sound and as far north as Boston on the East Coast.

Q. Do you have any pilot licenses, did you say?

A. Yes, sir. I have a first-class pilot from New

(Testimony of James A. Hazelwood.)

York Harbor, San Francisco Harbor, sea and return, and Los Angeles Harbor to Wilmington. [645]

Q. Have you navigated the Columbia River?

A. Yes, sir; as Master.

Q. How long ago?

A. From 1926 to October, 1935.

Q. When I said the Columbia River, I included the Willamette.

A. Yes, sir; the Columbia and Willamette rivers.

Q. Are you familiar with the Post Office Bar——

A. Yes.

Q. ——part of the river? A. Yes, sir.

Q. What do you say as to the practicability and safety of vessels to pass there, vessels and towboats to pass there port to port in accordance with Article 25 of the rules?

A. Well, in the channel, the 30-foot channel is 800 feet and the 35 channel is 600 feet. It is certainly room enough for vessels to pass there port to port without any danger.

Q. When you say “vessels,” are you confining that to ocean steamers, or all kinds of vessels?

A. No; any class of vessels.

Q. Including steamships and towboats with tows?

A. Yes, sir.

Q. Is there anything at all about the curvature of that channel or the wind conditions and so on, as they have been described to you in court, that would make the port to port passage difficult in that channel? [646]

(Testimony of James A. Hazelwood.)

A. No, sir; not that I can see. A channel that wide with the vessels making any headway through the water at all, they certainly should be able to keep clear of one another with a port to port passing, there.

Q. What would be the difficulty or impropriety of an ocean steamer going down there at night attempting to make a starboard to starboard passage?

A. Well, certainly in case of an ocean-going steamer down seeing a red light he would have no reason to believe that the tugboat and barges were anywhere but on their own starboard side of the channel and were coming across the channel, and showing him a green light he would have no reason to believe that such a thing would occur and an ocean-going steamer down there passing starboard to starboard, if he did get in close, he would be putting himself in the same position on the wrong side of the channel that the tugs claim is the reason they don't use the starboard side of the channel coming up. In case that he had to back for any reason, in case of close quarters and he had to back his ship, his stern would back right into that, if he was close enough, back into these old piling and damage his rudder and his propeller, and he just couldn't handle his ship any more.

Q. What would your bow do?

A. His bow would swing right across. If he had to back long enough he would head right across the channel with his bow, backing to the right.[647]

(Testimony of James A. Hazelwood.)

Q. What tendency would that have to increase the risk of collision?

A. He would get crosswise of the channel there and certainly in case of meeting another ship he would stand a very good chance of being in a collision, or a towboat.

Q. What effect would a downstream current have?

A. Well, a ship does not handle as well going with the current as she does against it, because in navigating in the river, in rivers, in case of fog, if you anchor, lots of times if the fog clears a little bit you will keep your anchor down until the tide changes and you have head current, and then you get under way and proceed slowly, because you always have control of the ship in case you have to stop. You don't have to do a lot of backing and get the way off your ship in case of meeting another vessel. In this particular place, if a ship did happen to be over on the west bank going down the stream with a fair current, and for any reason he had to anchor his vessel, his stern would swing around in that curve and he would have, instead of having his bow on the beach where he would over the other side, might go ashore, he would have his stern down on those piles again, and he would also take a chance of damaging the propeller and the rudder of the ship.

Q. You have heard this testimony, have you, about the practice on the bridge of a ship of the

(Testimony of James A. Hazelwood.)

navigating officers confirming to each other the whistles that are heard? Have you heard that testimony? A. Yes, I have, sir.

Q. Have you any comment to make on that? [648]

A. Mr. Wood, from my experience, that comes just as natural to you as someone speaking to you, to ask you "Yes" or "No," "I beg your pardon; I don't understand," men on the bridge of a ship hear a whistle,—it is most always one or two blasts, whatever that whistle is, repeat it, so it is just a practice and something that I have always heard myself on the bridge of a ship.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Hazelwood, to what extent have you had occasion to operate personally towboats on the Willamette River? A. None at all, sir.

Q. You have never been the pilot of a river steamer? A. No, sir.

Q. Stern-wheel or otherwise? A. No, sir.

Q. You have never operated a small tugboat at all?

A. No, sir. I have operated small vessels but not on the Willamette River.

Q. What vessels, if at all, have you actually operated on the Willamette River?

A. Well, I have never piloted the vessels on the Columbia River. I have been a Master of a ship

(Testimony of James A. Hazelwood.)

since 1926, navigating the Columbia River. About five times a year—that would be five trips in and out in that time. [649]

Q. You, however, have not actually piloted any ships then of any sort whatever in the Willamette River. Is that right?

A. No, sir; I have not.

Q. Have you piloted any ships at all in the Columbia River? A. No, sir.

Q. Then your knowledge of the situation down around Post Office Bar is just based upon looking at the place. Is that right?

A. Well, Mr.—I have been in rivers more difficult to operate than the Columbia River, and in any river, if I was going to use the wrong side of the channel I would use the same precaution that I would if I was going to drive up to my house on the wrong side of the street. I would make sure no one else was on that street when I did so.

Q. Now, Captain, how many ships does the American-Hawaiian operate in and out of Portland?

A. At the present time only twelve, but at the time that this accident occurred they operated twenty-two ships.

Q. Twenty-two ships? A. Yes, sir.

Q. Those, of course, are all ocean-going vessels?

A. Yes, sir.

Q. And how do the drafts of those vessels vary? Let us assume they are all loaded to capacity. What would the drafts of those ships vary from to what?

(Testimony of James A. Hazelwood.)

A. Well, from about 26 feet to 32 feet. [650]

Q. 26 to 32? A. Yes, sir.

Q. And then if they were partly loaded with cargo, or were travelling light, the draft would be less. Is that right? A. Yes, sir.

Q. In the case of your vessels which are loaded up to, say, 32 feet draft——

Mr. Wood: Pardon me. I think this will help you as well as me. Ask him, please, if those vessels customarily go out of here fully loaded. I do not think they do.

Mr. Young: I think, if the Court please, counsel may ask such questions as he wishes on examination. This is my cross examination.

Mr. Wood: If your Honor please, I presume what we are all after here is the truth and the facts. Now, if it is a fact, as I believe, that none of these vessels go out of here fully loaded, or hardly ever, why should not we know it now? He asked him to assume that they were all fully loaded, and what would they draw.

The Court: Go ahead, Mr. Young. I do not know what his point is at present.

(The last question was read by the reporter.)

Mr. Young: I will withdraw that question.

Q. Your counsel has made a statement, here, that your vessels do not operate in and out of this port loaded. What is the fact in that regard? [651]

A. That is a fact. They do not. It has been

(Testimony of James A. Hazelwood.)

about eight years since we had a vessel go out of here fully loaded.

Q. Well, in case you happen to get a cargo out of here you will load it fully, will you not?

A. We have to make several ports, you see, and our space is allotted so much to each port and this is the first port of loading, so therefore our vessels at the present time do not go out of here fully loaded.

Q. How nearly to being fully loaded do they come in and out of this port?

A. I think about 21 or 22 feet is as much draft as any of our ships have coming in and going out of here.

Q. There are, however, ships operated by other lines in and out of this port that move in and out fully loaded, do they not?

A. I understand so.

Q. Some of those ships will run as high as 30 or 32 feet in draft when loaded. Is not that true?

A. I understand that, **sir**.

Q. Now, in the case of your own ships, in going down past Post Office Bar, where do your ships travel with reference to the center of the channel?

A. Well, a vessel drawing nineteen feet of water certainly it's not necessary for him to keep in the 35-foot channel.

Q. Will you please answer my question? What is the practice of the vessels of your company with

(Testimony of James A. Hazelwood.)

respect to where they stay [652] relative to the center of the channel?

A. They stay in the part of the channel that there is enough water to float the vessel safely.

Q. Now, how near do they go to the center of the channel?

A. Not necessarily always in the center of the channel. They keep to the right-hand side—their own right-hand side—of the channel in navigating the channel.

Q. You say “Not necessarily.” You mean that they do use the center of the channel from time to time. Is not that true?

A. Well, if you stay on the ranges you are more or less in the center of the channel.

Q. Yes. A. Yes.

Q. As a matter of fact, if you are travelling on Post Office Range, you have to go through the center of the channel, do you not? A. Yes.

Q. That is right. And when you go off that range, you will have to be in the center of the channel for at least a short period of time, will you not? A. Yes.

Q. And Post Office Range is in close proximity to Post Office Bar, is it not?

A. Well, that is what they are called, Post Office Bar Ranges.

Q. In other words, a ship which is travelling along the line which is set by the United States

(Testimony of James A. Hazelwood.)

Engineers is necessarily [653] travelling toward the center of the channel, is it?

A. That is a fact, but it also don't necessarily mean that this vessel has to keep right on these ranges. When there is enough water on the starboard-hand side to do it, she can come off the ranges at different points, not necessarily staying right in the center of that channel. Those ranges are only there to line up the channel when you enter the channel, if you so see fit to use the—off the ranges with the ranges open to the left or to the right, that is entirely up to the Master of the ship.

Q. You are not, however, violating any navigation of those if you use the ranges, are you?

A. No, you are not.

Q. Suppose that an ocean-going ship is proceeding downstream in the center of the channel. Is it not a fact that there would be ample room for that ocean ship to pass a river boat starboard to starboard?

A. Yes.

Q. Do you know what the depth of the river is opposite Post Office Bar?

A. Yes.

Q. How does it vary?

A. Well, it varies from over on the east side to practically no water up on that shoal, across to the dike on the other side from 30 to 35 feet of water.

Q. And do you agree with the other witnesses in this case that [654] it is comparatively shoal

(Testimony of James A. Hazelwood.)

water out to about 400 feet from the east shore before you get to the 35-foot channel?

A. Yes.

Q. Now, from that 400-foot point on over to the east edge of the river, do you know to what extent the water shoals?

A. No, I don't know.

Q. Do you know how many feet of water there are, for example, in the last hundred feet up to the east bank?

A. No, I don't know that.

Q. You would not want any of your boats to be over there, would you?

A. Well, they have no business over there. If they did they would be out of the channel, and they are not supposed to navigate out of the channel.

Q. You were stating, however, that if your boat is drawing only 21 feet of water, that it can, with complete safety, travel in the 30-foot channel?

A. Well, certainly.

Q. As a matter of fact, the actual ship channel maintained by the Government is a 35-foot channel, is it not?

A. Well, I am not so sure of that. They certainly dug that 30-foot channel out there. That channel didn't just naturally get there alone. It was certainly dug out, and that channel was dug to that depth for that width so it would be safe for a vessel to navigate that channel. That was the idea.

(Testimony of James A. Hazelwood.)

Q. Pardon me? [655]

A. That was the idea that the engineers had in mind when they widened that channel to 800 feet, so as to make it a safe passage through those waters.

Q. When was it that they widened it?

A. I understand about two years ago. I know I saw the dredges working there at different times.

Q. Is the United States Government maintaining any of the channel except the 35-foot channel?

A. That I couldn't say.

Q. Now, Captain, you testified that it was just a matter of every-day conversation, as it were, for the navigating officer or the pilot on the bridge of one of your ships to say that he hears one blast or two blasts of a whistle of an approaching ship and then receive a confirmation from the other men on the bridge. Is that right? A. Yes.

Q. Is that a practice which exists peculiarly on American-Hawaiian ships?

A. I don't think so.

Q. You don't think so?

A. I don't think so. It is a custom of the American-Hawaiian, but I think it is more or less a custom on any ship, that those orders are passed.

Q. Is that a custom which has been established by direction of any of the officials of your company? [656] A. No.

Q. It is just a habit that the men have gotten into. Is that right?

(Testimony of James A. Hazelwood.)

A. It is a habit on the American-Hawaiian ships. The men that are Masters of those ships are men that have gone up there from sailor and quartermaster, and it is something handed down from generation to generation of American-Hawaiian ships.

Q. How many generations have American-Hawaiian ships been running in and out of this port?

A. They have been running only since the last World War, that the American-Hawaiian began running ships in the Columbia River.

Q. Is it not a fact, Captain, that the real purpose of this conversation which takes place between the pilot and other officers on the deck is to satisfy the pilot with the accuracy of his own observation in a case where he is in doubt?

A. No. No, that is not a fact. On shipboard there is always a rule that whenever an order is given it shall be repeated by the person that the order is given to, and also those things happen to—if a person repeats something, other people repeat those orders to be sure—it is a check, more or less.

Q. If the pilot calls out, "I hear one blast," that is not an order, is it?

A. No, that is not an order, but it means he hears one blast, and if there is any question that the others hear two blasts, then someone on the bridge will say, "I think you are mistaken. That is two blasts of the whistle. I think I heard two blasts."

(Testimony of James A. Hazelwood.)

Mr. Young: That is all. [657]

Mr. Wood: I want to ask a question, Captain Norberg.

The Court: Mr. Maxwell, will you phone down to your office and ask them to send up that 1940 A. M. C.? It is out of the library. It is being bound. Hand it to Mr. Maxwell.

Redirect Examination

By Mr. Wood:

Q. Captain Hazelwood, you have looked at this chart. You recognize it, do you not?

A. Yes, sir.

Q. You said that if a vessel came down on the range and into the center of the channel, there would be room for a starboard to starboard passage between an ocean steamer and a towboat?

A. Yes, sir. Well, he would have to stay on the range that much longer. He would have to get over on his——

Q. There would also be room for a port to port passage, would there not?

A. Certainly there would.

Q. Passing either side, as far as room goes?

A. Yes.

Q. In other words, there is plenty of room?

A. Plenty of room.

Q. Now, the obligation of a vessel, according to the law, is to stay on that side of the channel which lies on her starboard-hand. Is that right?

A. That is right. [658]

(Testimony of James A. Hazelwood.)

Q. And you said that the vessel, that the purpose of a range was largely to guide a man in entering——

A. That is right.

Q. ——a narrow or dredged channel.

A. That is right.

Q. Now, it does not mean, however, that he must keep those range lights directly in line?

A. Not at all.

Q. What does it mean?

A. Well, it means that he comes in that channel, and when he gets on those ranges he knows it is time he can turn into that channel, and he can stay on those ranges, but he can keep them open from either side. That is entirely up to him.

Q. In other words, when a man is staying on the range, he does not necessarily have to have the lights in line, does he?

A. Well, if these ranges was right, in parallel with the channel, and he was meeting another ship coming up, he would have to get off those ranges—one of those vessels would have to get off the ranges to make the passage.

Q. Exactly.

The Court: What is the next range below Post Office?

A. There are no more ranges in the Willamette River, I don't believe.

Mr. Wood: Q. In other words, a pilot coming down and staying on the right-hand side of the channel, he can have the range [659] lights open

(Testimony of James A. Hazelwood.)

on that side and still be guiding himself by the range, can he not?

A. Sure. In other words, if he is to the left, the ranges would open one way. If he went to the right, these lights—this time would be one on this side and the next time it would be the opposite direction.

Q. Now, if you look at this chart and look at the place where both pilots practically have marked the position of the Pennsylvanian at the first sight, if the Pennsylvanian was right on the range, there, he would still be on the right-hand side of the channel at that point, would he not?

A. He certainly would.

Q. And as he comes down here and begins to leave the range, where I am pointing, with the blue cross, he would be still further on the right-hand side of the channel? A. Yes, sir.

Q. And he would be on the right-hand side of the channel all the way down, would he not?

A. He certainly would.

Q. That is proper navigation, is it not?

A. It certainly is.

Mr. Wood: That is all.

Recross Examination

By Mr. Young:

Q. Captain, a river boat can, with complete safety to itself, [660] travel up or down stream in the most easterly 400 feet of the river's width, can it not?

A. I don't know. I take for granted he can, but

(Testimony of James A. Hazelwood.)

he certainly should be out of the channel if he is going to do that.

Q. I said in the easterly 400 feet.

A. Yes.

Q. That puts it out of the 35-foot channel, does it?

A. But that is still not out of the channel if a ship is only drawing 19 feet of water.

Q. Do you understand me? That 400 feet is east of the 35-foot channel, is it not?

A. That is right.

Q. Now, a river boat can, with complete safety to itself, travel in that 400 feet of distance, can it not? A. Yes.

Q. On the other hand, the moment that one of your ocean-going vessels, whether it is an American-Hawaiian or any other ship drawing anywhere from 20 up to 32 feet of water, gets over within that 400 feet, it is encountering serious hazards to itself, is it not?

A. Yes, and I don't think any ship, because he wasn't drawing enough water, would deliberately run into another just to keep him on the side of the channel, to keep him off the east side of the channel.

Q. You do not agree that is what the American-Hawaiian Pennsylvanian did? [661]

A. I certainly do not. Because he was in 35 foot of water when the collision occurred.

Q. You observe this mark, do you not, this cross mark, which is right on the edge——

(Testimony of James A. Hazelwood.)

A. Yes.

Q. ———of the 35-foot—that cross mark is exactly alongside of the number 27, which is on the east side, and the number 37 on the west side. Do you agree with that? A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.)

Mr. Wood: We will call Captain Dyer.

HENRY C. DYER,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Dyer, what is your present residence and occupation?

A. I am at 2967 Northwest Raleigh, and I am port captain for the Pacific-Atlantic Steamship Company and the States Steamship Company and California-Eastern.

Q. And what has been your experience as a ship Master?

A. On actual ships about eight years, about eight years at sea [662] as Master.

Q. As Master. And prior to that time?

A. As chief officer and second officer and so on down. I have been at sea for about 26 years.

(Testimony of Henry C. Dyer.)

Q. What trades were you in or what steamships did you operate during that eight years you were Master?

A. Matson Navigation Company running in the northwestern run to the Hawaiian Islands and in the States Steamship Company to the Orient.

Q. When you were running the States Steamship Company to the Orient, what ship did you have?

A. The Iowan and the General Sherman. The General Sherman for the principal part of the time.

Q. You were not on the Iowan when she was wrecked?

A. No, sir.

Q. And all lives were lost?

A. All lives were lost.

Q. Now, in your capacity as Master of steamships on that Oriental run for the States Steamship Company, did you navigate the Columbia and Willamette rivers?

A. Yes, sir. On the General Sherman I made thirteen successive trips. On the Iowan I came in as Master.

Q. And as port superintendent for those companies, is it your duty in a general way to be familiar with the ship operations on the rivers, here? [663]

A. Yes, sir.

Q. Are you familiar with the channel at Post Office Bar in the Willamette River?

A. Yes, sir; fairly familiar.

(Testimony of Henry C. Dyer.)

Q. What is your expert opinion on whether or not it is safe and practicable there for a river steamboat with barges alongside and in front, in tow, to pass an ocean-going steamer there port to port in the nighttime, a calm night and visibility good? A. Well, I see no reason——

The Court: The wind ten to fifteen miles an hour, or do you want to include that?

Mr. Wood: Well, the wind ten to fifteen miles an hour according to some testimony, but seven miles an hour according to the Government records of Portland.

The Court: What wind do you want to put in your question?

Mr. Wood: I will put it the worst for my point of view. I will say with the wind ten to fifteen miles an hour from the East.

A. I don't see any reason why they shouldn't pass port to port, each with his own starboard-hand to the channel, the width of the channel there is there.

Q. You have never been a towboat man yourself, have you? A. No, sir.

Q. However, in the course of your long experience as a navigator, I assume in many instances you have witnessed towboats and observed them?

[664]

A. Yes, sir.

Q. And passed them, have you?

A. Yes, sir.

(Testimony of Henry C. Dyer.)

Q. You know how they handle in a general way?

A. In a general way; yes, sir.

Q. In fact, some of the harbors that you have entered like Hawaiian and San Francisco are full of towboats, are they not?

A. Oh, yes.

Q. There has been some implication here that a practice of officers on a bridge of a ship to confirm signals heard is more or less confined to American-Hawaiian steamships. I want to ask you whether you know of such a practice.

A. I don't think it is confined to the American-Hawaiian. I think that confirming whistle signals, confirming various navigational data is customary on any ship.

Mr. Wood: Yes. That is all.

You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Dyer, as I understand, you, yourself, have never operated a river steamer?

A. No, sir.

Q. You have never operated one of these stern-wheel boats down here in the river?

A. No, sir. [665]

Q. Have you ever operated a river tug of any kind?

A. No, sir.

Q. Your experience, then, in the actual handling of vessels has been confined to ocean-going ships?

A. Yes, sir.

(Testimony of Henry C. Dyer.)

Q. You have just seen the others on the river. Is that it?

A. Well, and been assisted by them.

Q. You have been what?

A. Assisted by them in docking and so forth.

Q. But you, personally, had nothing to do with the actual operation or piloting of any of those river boats? A. No, sir; that is very true.

Q. Now, how many times altogether in your life do you think you have been over Post Office Bar?

A. Oh, I would say forty.

Q. Forty? A. Yes.

Q. And that is spread out over what period of time? A. Roughly ten years.

Q. When were you last over Post Office Bar?

A. I believe last year I went over and relieved the Master of the ship going to Vancouver, something of that sort.

Q. At any times when you were piloting vessels past Post Office Bar, did you ever meet any tugs with tows?

A. I have never piloted vessels over—I mean I have been in the [666] capacity of Master, but I do not hold a pilot license on the Columbia River.

Q. You have never even piloted a vessel of any kind on the Willamette or Columbia rivers?

A. No.

Q. You acted solely as Master?

A. As Master.

Q. Do you remember whether or not when you

(Testimony of Henry C. Dyer.)

were on any vessels going Past Post Office Bar that you met any tugs with tows?

A. I don't remember any specific incident, no.

Q. Do you, personally, know what the depth of the water is at Post Office Bar?

A. Well, it is a 35-foot channel—the various depths, 36, I think, up to 38 in some places.

Q. And how wide is that 35-foot channel?

A. I believe in the neighborhood of 800 feet.

Q. 800? A. Yes.

Q. Are you not getting the 35-foot channel confused with the 30-foot channel? A. Possibly.

Q. In other words, the 35-foot channel may be narrower than the eight hundred feet?

A. Yes.

Q. Do you know where that channel is with reference to the west [667] side of the river at that point?

A. It is a little bit closer to the west side than the east side.

Q. In other words, the water shoals over on the east side, does it not?

A. Shoals to the east side, yes.

Q. On vessels of which you have been Master, going up and down the Willamette River, what has has been their draft?

A. Well, I have been with nothing deeper than 24-6, I would say; possibly 24-9.

Q. Is that light or loaded?

A. That would be loaded.

Q. Well, the vessels of the States Steamship

(Testimony of Henry C. Dyer.)

Company are smaller, are they not, than the American-Hawaiian?

A. I think as an average a little smaller. I am not sure.

Q. And probably do not draw as much water?

A. Well, our average draft is around 25-9 with a deck load of timber load line. We have two vessels with a deeper draft.

Q. In proceeding over these river channels, where do your ships tend to stay with reference to the center of the channel?

A. Well, that is pretty hard—the ships that I have been on have tended to stay on the right-hand side of the channel.

Q. How close, however, to the center line of the channel?

A. Well, that would vary with conditions, in making bends.

Mr. Young: That is all.

Mr. Wood: That is all, Captain Dyer.

(Witness excused.) [668]

CARL A. ANDERSON,

produced as a witness in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. What is your occupation, Captain Anderson?

A. A United States Assistant Inspector of

(Testimony of Carl A. Anderson.)

Hulls, Bureau of Marine Inspection and Navigation.

Q. In the office of the local Steamboat Inspectors here in Portland?

A. Yes, sir. At present I am acting local while Captain Joachims of the local inspectors is on vacation.

Q. You are, I take it, his assistant and act in his absence? A. That is right.

Q. You are, however, familiar with the records of your office? A. Yes, sir.

Q. And I will ask you whether or not the office of the local Steamboat Inspectors, here, acted on a collision between the diesel tugs with their tows, Twin Point and Modoc, which occurred on October 7, I think, 1938?

A. I believe that is the Tidepoint.

Q. Tidepoint and the Modoc? A. Yes.

Q. And your office conducted an investigation, did it not? A. Yes, sir.

Q. And made a decision on that collision, did it not? A. Yes, sir. [669]

Q. And is it not a fact that the Modoc, a tug with her tow, was condemned by your office and held in fault for coming up on the left-hand side of the river at Post Office Bar?

Mr. Young: Just a moment. I object to that question and move that it be stricken, your Honor, upon several grounds: that, in the first place, the office of which this gentleman is an assistant in-

(Testimony of Carl A. Anderson.)

spector is one which has only authorization to conduct investigations and make recommendations. It does not make final decisions upon any matters of this sort. In the second place, any findings which are made by these local inspectors at most show only the opinion of the Board with reference to the subject concerning the evidence which is adduced before them, and are nothing but opinions and therefore not in any sense binding. Moreover, there is nothing here to show that any notice of any opinions of this sort is given broadcast to pilots on the river or that they are in any sense bound whatever by them.

Mr. Wood: It is our position, your Honor——

Mr. Young: Pardon me just a moment.

Moreover, your Honor, there is nothing here to show in this case that this particular Inspector was even in the office of the local Inspection Bureau at the time that the accident to the Modoc and the Tidepoint took place, that he has any personal knowledge whatever of it, that the most that he could know about it would be what he has read in the record, and at the proper time, if counsel wishes to try to introduce the record, objection can be [670] made to that on other grounds.

The Court: Does he have the record with him?

Mr. Wood: I do not know.

Q. Have you the record with you?

A. No, sir. I haven't.

Mr. Wood: If your Honor please, my position

on that is this: I have brought him here, not for any claimed personal knowledge that he had of that collision, not that he was necessarily in that office, there, but as a man who knows the records of the case and merely to obviate the necessity of bringing the record up here and introducing it, which requires subpoenas duces tecum and some formality. I am only asking him to state what that decision was of his office, which he knows from the official record. So much for that.

Now, his office is the office which has jurisdiction over pilots, and in case of collisions it investigates and reprimands pilots or takes their licenses away or imposes some kind of disciplinary action on them, so that when this office, in a previous decision, decides, actually decides, officially, that that is a narrow channel where pilots must keep to the right, if it is safe and practicable for them to do it, and in that case it was tugs and tows, why that is a sufficient decision of the body in charge of pilots, and pilots are bound to observe that decision. Suppose, for example, that that local Inspectors' office decides one thing and they are the body having control of pilots, [671] and your Honor then decides another thing. What position is it going to put the pilots in? How do they know where they stand? That is my position, that when not only the law and the statute since 1907 has made this narrow channel rule the statute law, but this local Inspectors' office has decided that, in this very

place, it is a narrow channel where the vessel should pass port to port and a pilot is guilty if he comes up with a tow on the left-hand side, now is not that evidence that your Honor wants to hear?

Mr. Young: Now, if the Court please, I should like to be heard at some length upon this point.

The Court: Captain, step down. You will be more comfortable for the next half hour, now.

Mr. Young: Opposing counsel has stated to your Honor——

The Court: Who has the map, Mr. Bragg?

Mr. Young: ——that the gentleman who was just upon the witness stand, although having no knowledge whatever of the facts concerning this collision, without any showing that he was even in the office of the Inspector at the time that the investigation took place, but based solely upon presumably what he had read in this record which to him would be all pure hearsay, is at liberty to tell your Honor what that record shows. The various statements made by counsel as to what he claims that record shows——

The Court: Mr. Young, argue it as if the record were being offered. [672]

Mr. Young: Argue it as if the record were being offered? Very well, your Honor.

At this time, your Honor, I object to the introduction of the record upon the following grounds. In the first place, the record to which counsel is now referring involved the collision between two

motor river tugs and not an ocean steamer or a river tug carrying barges, or towing barges. In the second place, the record shows a complete absence of any issue ever having been raised whatsoever that it was neither safe nor practicable for river boats to use the west side of the river at that particular point. In fact, the case was tried with the parties completely ignoring any contention of that sort. Therefore, the issue which is now before your Honor was not even considered in that particular case. In the third place, there was no reference whatsoever made in the record of that case to any long-established custom of river boats to use the east side of the channel, nor was any reliance placed upon that point in reaching a determination upon that particular subject. In the fourth place, the pilots who were involved in that particular case were not subject to being disciplined by the Board for the reason that they were operating only motor boats, and therefore were not required to have licenses, and the Board had no jurisdiction in itself to discipline these men as individuals. Fifth, the Board, at most, under the statute, could do nothing more than make findings and recommendations. It had no power to reach final conclusions upon any matter [673] whatsoever. That had to be referred to Washington, and even after that, in this particular case, this involving only the operators of motor tugs, even the Department of Commerce in Washington was not in any position to do anything

with regard to these two individuals who were being charged at the time of this particular hearing. Next, the findings of the local Board of Inspectors under a decision of the United States Supreme Court in the case of the steamboat *Charles Warren*, 115 U. S. at page 70, at most shows only the opinion of the Board upon the subject from evidence adduced before them.

The Court: 117?

Mr. Young: 115 U. S., page 70.

The Court: What is it? 115?

Mr. Erskine B. Wood: 115.

The Court: Oh, yes.

Mr. Young: And finally, your Honor, without any preliminary showing in this case that there was any notice given by the Department of Commerce with respect to any decision made by that department, other pilots upon the river would under no circumstances be charged with knowledge thereof, and, indeed, there is nothing here whatsoever to even suggest, either as a matter of law or fact, that any findings or determinations made by this local marine board could have the effect of law which would be binding upon any other pilots. For that reason I object to the introduction of this particular record. [674]

Now, I may say further, by way of argument, that counsel's statement to your Honor a few moments ago, if your Honor were to examine that record, you would find would be refuted definitely

by the record, because the Board in that particular case determined that it had no power to impose disciplinary action upon these two pilots who were involved. Yet counsel has informed your Honor that the officers did, in fact, impose disciplinary measures upon these individuals. Moreover, counsel has said that there was a finding in that case that it was safe and practicable for river boats to use the west side of the river, and I am stating to your Honor upon an examination of that record that that matter was not even presented to the Board, all of which further shows the entire impropriety of counsel, by purely oral testimony of this witness, endeavoring to bring before your Honor matters which are necessarily found only in the record and matters which, in any event, would be entirely improper for the reasons that I have just enumerated.

The Court: If that record is admissible, the one in the present case would be admissible, would it not, Mr. Wood, for the same reason?

Mr. Wood: Well, I do not think that it would necessarily follow, your Honor.

The Court: Why not?

Mr. Wood: Well, I am offering the record in the first case for the purpose of showing that there has been a previous ruling by [675] the proper office having jurisdiction——

The Court: You are offering it on the basis of notice?

Mr. Wood: Yes.

The Court: Is that it? For its evidential value as notice?

Mr. Wood: Yes.

The Court: There is just a paragraph, there. Will you look at that paragraph, 115 U. S.?

Mr. Wood: Of course, I do not know this case, but I do not think this is applicable when I offer this record for a different purpose entirely. I am trying to show, your Honor, the confusion that must result in pilots' minds when the local Board of Inspectors decides a thing two years ago and then the pilots do not obey it and come along and try to persuade your Honor to decide something else.

The Court: Will you come back here, Captain, to the witness stand?

The objection——

Mr. Wood: If your Honor did not want to hear me,——

The Court: I do want to hear you, of course.

Mr. Wood: I only wanted to say this. Mr. Young said that that case did not involve a collision between a tug and an ocean steamer. That might go, possibly, to the weight of that decision as it affects this case, but it does not affect its competency or admissibility, nor does it go to the point at all that here is a previous ruling by these Inspectors that this is a narrow [676] channel where the port to port rule must be obeyed. Now, Mr. Young has said that there was no finding in that

(Testimony of Carl A. Anderson.)

case involving the issue of safety or practicability. Why, that issue of safety or practicability is necessarily involved when the Inspectors say that the vessel was not justified in coming up on the left-hand side because if she was justified in coming up on the left-hand side it would mean she did so because it was not safe and practicable to go on the other side? That is all there is to that. Now, the recommendation. He says it was only a recommendation. That is all the authority this office has. I think the record will show in that case that that recommendation by the Inspectors here was confirmed, when referred to their official superiors in Washington. Is not that a fact?

A. That is right, sir.

Mr. Young: If the Court please, this question and answer are also under the same objection.

The Court: I understand that, yes.

The testimony as offered in the present form as oral testimony from the witness is rejected. As to whether I would deem the record admissible, I must reserve ruling as to that, if it should be offered.

Mr. Wood: May I have an order, then, your Honor? You know the rules of this court require a court order to get a subpoena duces tecum, or will your Honor order this witness to please produce this record? [677]

The Court: Yes, I will so order, reserving decision on its admissibility.

Mr. Wood: Yes, your Honor.

Then, Captain Anderson, you need not leave the

(Testimony of Carl A. Anderson.)

stand right now, but you will bring the record up here.

The Court: Bring the whole record. Bring everything pertaining to the case if you bring anything.

A. All right, sir.

Mr. Wood: Q. Now, I want to ask you one other question. There seems to have been some question here in this case as to whether these craft as shown in this photograph of the Western Transportation Company paper barges are barges or scows, as that term is understood in the Inspectors' regulations.

Mr. Young: Did you ask a question?

Mr. Wood: I am asking for his statement as to what they are.

Mr. Young: That is objected to, your Honor, upon the ground that——

Mr. Wood: As he interprets it.

Mr. Young: ——that there is no showing that this individual is anyone who has the power to determine what those particular boats may be. His conclusion in his own mind upon the matter would be utterly immaterial so far as the Court is concerned.

The Court: Qualify him a little further, will you, Mr. Wood?

Mr. Wood: Q. Captain Anderson, the lights that are to be carried by barges or scows are prescribed by the regulations [678] promulgated by your department, are they not?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

Q. And how long have you been at work in that department?

A. Well, I was appointed in Baltimore in March, 1937, and was transferred out to Portland, Oregon, and reported here December 17, 1937.

Q. And you know where the rules are, the Pilot Rules, or the Inspectors' regulations, concerning lights on barges and scows, do you not?

A. Yes, sir.

Q. And you know what those rules are?

A. Yes, sir.

Q. Now, it is part of the functions of your office to see if those rules are complied with, is it not?

A. Yes, sir.

Q. And the rules are not the same for barges as they are for scows, are they? A. No, sir.

Mr. Wood: I think with that qualification I will repeat the question.

Q. Are these craft of the Western Transportation Company——

The Court: In your opinion.

Q. ——in your opinion barges or scows?

Mr. Young: The same objection as before.

The Court: He may answer subject to the objection. [679]

A. In my opinion I would consider them lighters or scows, and may I refer to——

Mr. Wood: Q. Yes, but may I ask you——“lighters or scows”—is a lighter a scow?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

Q. And is a scow a lighter? I do not quite get that distinction.

The Court: In your opinion are they barges?

A. No, sir.

Mr. Wood: Q. Very well. Now, you were going to refer to something.

A. I was going to refer to the definition by the Department of a lighter, of June 20, 1929, which gives the definition of these different craft, here.

Q. Yes. A. May I read them?

Mr. Young: I object to the witness reading this letter, your Honor, for the reason that it is not in accordance with the statute at all or the Pilot Rules, that the Pilot Rules, themselves, will have to be construed by your Honor as to what their meaning is, that this is only an informal letter which the witness is now purporting to read from, that it would not under any circumstances be binding upon the operators or pilots of barges or scows or lighters in this particular harbor.

The Court: Whom is the letter by?

A. It is from the — [680]

Mr. Young: This, moreover, is not a lighter——

A. ——Supervisor Inspector General Hoover at Washington, D. C.

The Court: Hoover?

A. Yes, sir.

Mr. Young: I wish to add, also, your Honor, there is nothing here to show any authority in this

(Testimony of Carl A. Anderson.)

Mr. Hoover to promulgate any informal regulations, that the Pilot Rules govern upon this matter.

The Court: I will reject the letter in evidence, but it may be referred to in argument, Mr. Wood.

Mr. Young: May I except to your Honor's ruling upon that point, because if the letter is not to be introduced in evidence it certainly will be objectionable for counsel to be referring to it in argument. Counsel is not at liberty, if the Court——

The Court: Mr. Young, do you mean to tell me that when we are dealing with administrative matters that we may not take within the judicial ken in argument administrative rulings and practices, that when a labor relations question is being presented in this or any other court, for instance, that references may not be made to the administrative rulings for such aid as they may be, made by the National Labor Relations Board?

Mr. Young: Well, if it is first, as a preliminary matter, shown that the particular board or the official in question is one whose duty it is to promulgate certain regulations, that is one thing.

The Court: I will admit the letter now in evidence subject to [681] the objection. Have a copy made and put it in evidence subject to the objection, Mr. Wood.

Mr. Wood: Very well.

Mr. Young: May I see the letter, your Honor?

The Court: Certainly.

(A copy of the letter, so offered, was received

(Testimony of Carl A. Anderson.)

in evidence and marked Respondents' Exhibit 14.)

RESPONDENTS' EXHIBIT No. 14

(Copy)

E 230
Circular Letter. June 20, 1929.

U. S. Supervising, Traveling, Local and
Assistant Inspectors,
Steamboat Inspection Service.

Subject: Definitions for barge, scow and lighter.

From recent correspondence that the Bureau has had in connection with definitions for barge, scow and lighter, it has occurred to the Bureau that the report adopted by the Board of Supervising Inspectors at its recent session covering these definitions might be of assistance to you, and the same is quoted below:

“The communication submitted states in part as follows:

‘Requests the Board of Supervising Inspectors to define barge, lighter, and scow, and prescribe lights to be carried by lighter, in tow of steam vessel’ and is replied to as follows:

DEFINITIONS

Barge

A barge is a type of vessel of ship-shaped superior construction being fitted with a rudder and constructed for the carrying of cargo under deck. It has no motive power of its own.

(Testimony of Carl A. Anderson.)

Living quarters are provided for the crew, who attend to the steering, pumping, etc., incident to the voyage.

Scow

A scow is a flat-bottom structure of broad beam and square ends and is generally used to transport mud, coal, garbarge and like cargoes. It might be termed as of inferior type of construction. It does not carry cargo below deck and is of an open body type. It is without steering gear or control of its own.

Lighter

A lighter is a broad beamed, flat-bottomed craft, one type decked from end to end and the other type is fitted with a superstructure. Upon both types, no rudder is provided for steering control. By interpretation of intent as to the carriage of lights, it is set forth as a ruling by the Commissioner of Navigation and Supervising Inspector General, under date of March 26, 1923, file no. 3819 that a lighter is an inferior type of vessel as comparable with barges and canal boats.

Therefore your Committee reports that it is of the opinion that lighters should carry as follows, as prescribed for scows, namely:

“Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at end of

(Testimony of Carl A. Anderson.)

each scow (each end) except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern * * *''

D. N. HOOVER

Supervising Inspector
General

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: Just waiting while he reads the letter.
A. That is all right.

The Court: Step down a moment, will you, Captain, please?

Mr. Young: I have seen it, your Honor.

The Court: I wish you would develop your position about scows and barges more fully than you have. Who has the barge side of it and who has the scow side of it? Are you a scow man or a barge man?

Mr. Young: I am a lighter man.

The Court: What are you, Mr. Wood, a barge man or a scow man?

Mr. Wood: Well, personally I think they are scows, but it does not make much difference to me, because, whether they were barges or scows, I do not think the lights were in accordance with the regulations, but I think your Honor ought to be

informed about the official ruling about it. I think they are scows.

The Court: You claim they are scows, and you are holding them to the standards of scows? [682]

Mr. Wood: That is what I think.

The Court: And those are more severe than the standards for barges?

Mr. Wood: I do not know as they are more severe. They require different kinds of lights.

The Court: And you say what, Mr. Young?

Mr. Young: I shall be compelled to make a rather lengthy statement upon this subject, your Honor.

The Court: You might just as well do it now as later.

Mr. Young: Very well.

I am very frank to say that I am uncertain as to what these are. In fact, I have not been able to find anybody who can tell me what these particular boats are. They have, throughout this trial and in the previous proceedings, been called barges, but, in speaking of them as barges, they have been called barges not in any technical sense, but, rather, in the sense that river boat men just generally have to have a word to cover the particular situation, and the word "barge" seemed to be about as general as any. If your Honor will examine these Pilot Rules upon the question of the lights that are to be placed upon barges and scows, you will find that, while there are certain requirements set forth as to what those lights shall be, the Pilot Rules are absolutely silent as to what a barge is, as to

what a scow is, as to what a lighter is. Now, if you will look up in the dictionary the word "barge" or the word "scow," you will find that [683] both of them are flat-bottomed boats that are ordinarily used for hauling purposes in rivers. What possible assistance have you gained, then, with reference to what the meaning of a barge is as distinguished from a scow, or even from a lighter? Now, it is because of that circumstance that it has been our position that the Pilot Rules are so utterly hazy and indefinite in their meaning that nobody can tell what these boats are required to carry under any particular circumstances. If the Pilot Rules contained a definition of the term "barge," and then said what kind of lights a barge must have, then we could readily determine whether or not these particular boats are barges within the meaning of the Pilot Rules. Moreover, if the Pilot Rules contained a definition of the word "scow," and said what lights have to be carried by scows, we could apply the definition to these particular boats and decide whether or not we had to have that sort of light. On the other hand, if they happen to be lighters, the curious part about it is that the Pilot Rules do not contain any requirement as to any particular kind of lights that the lighters must actually carry except that, in the case which was referred to in the evidence, here, at an earlier time, in the case of vessels which are on certain Eastern rivers, there is this language—and I think this is of some value

from the standpoint of interpreting the Pilot Rules—it is that “When nondescript vessels known as scows, car floats, lighters, barges or canal boats, and vessels of similar type, are towed alongside [684] a steam vessel, there shall be displayed a white light at the outboard corners of the tow.” Now, that is the nearest approach that you can get anywhere in these Pilot Rules to what these particular boats were supposed to have at this particular time, because all of them are lumped together as barges, scows, and lighters. There is no distinction among them. Now, it is true that this particular section that I read to your Honor has to do with lights for barges and canal boats on the Hudson River and adjacent waters and Lake Champlain, but the curious part about it is that the lights that are referred to there are actually the lights that were on the boats that we had at the time of this accident, and, as the witnesses, at least up to this stage, have uniformly testified, they are the lights that for years and years and years last past have been used on boats that are being towed by other boats, and therefore it would seem that in view of the uncertainty as to the meaning of these Pilot Rules and the fact that when the Pilot Rules did at one time talk about nondescript vessels such as scows, car floats, lighters, barges, and canal boats and simply said they must display a white light at the outboard corners of the tow, it seems that we have done the sensible thing by putting the lights on the outside of those boats.

Now, referring specifically, your Honor, to what these Pilot Rules say about barges, let me read this, at page 26: "Barges or canal boats shall, when being propelled by pushing ahead of a steam vessel, display a red light on the port bow and [685] a green light on the starboard bow of the head barge or canal boat, carried at a height sufficiently above the superstructure of the barge or canal boat as to permit said side lights to be visible; and if there is more than one barge or canal boat abreast, the colored lights shall be displayed from the outer side of the outside barges or canal boats." In other words, if anybody could tell what a barge was, within the meaning of this particular section, and if there were no argument as to whether the boat in question were a barge, then, under this section of the Pilot Rules, the barge would be required to have a red light on the port bow and a green light on the starboard bow. In other words, they would be identical lights with those that already appear as the running lights on the starboard and port sides of the Barry K, itself. Now, continuing: "Scows when being towed by steam vessels on the waters covered by the first paragraph of these rules shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside bows in the last tier shall each carry, in addition——"

Mr. Wood: "Outside scows."

Mr. Young: —“outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an [686] unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles.” Now, if anybody could determine from a reading of that what a scow is, and, if it were admitted that these particular boats were scows, then they would have to have the lights that are referred to in that particular section.

And, incidentally, I may call your Honor’s attention to the circumstance that under this section the lights called for are lights which are white lights. They must be not less than 8 feet above the surface of the water and so placed as to show an unbroken light all around the horizon. In other words, even though they blind the pilot in the pilot house, that would make no difference. You would have to have those particular lights on the scows.

Now, your Honor, our position, I think I have stated, is simply this: that you can read those Pilot Rules from one end to the other and you cannot get any light on what is meant by the term “barge,” by the word “scow,” or by the word “lighter.” If they were barges, then they would have to have the red and green; if they were scows, then they would have to have these lights showing all around the

horizon a distance of five miles; if they were lighters, the rules are silent as to any specific requirements as to what they were to have, except that in the Eastern rivers they have these white lights on the outer corners. The white lights are the ones that all of the boats in this harbor— [687] that is, all of the scows or lighters or barges or whatever you call them—have been carrying when they have either been on the nose of the towboat or the starboard or the port side.

I say then to your Honor, under these circumstances, that in view of the hastiness and indefiniteness of the Pilot Rules, and in view of the circumstances, that if there is a violation of those Pilot Rules, the Inspectors may make investigation and may make recommendations as to what is to be done, that those Pilot Rules have got to be construed strictly, and that since no body can distinguish among the various types of boats that were there referred to in any particular case, it seems to me that no particular pilot would ever be held guilty of violating these rules when he does not know what they actually mean.

Now, there is one thing further that I have called to your Honor's attention, and that is, presumably the local investigation board here knows what *it* is going on in the rivers; and yet, as the testimony shows, for years and years last past it has been the practice to carry just these lights of the kind that we have testified were on the boats that were being pushed by the Barry K. Under those circum-

stances, I would say that there is no violation of Pilot Rules here involved, and that, so far as the accident here is concerned, it is perfectly patent that if your Honor believes the testimony of the witnesses for the Libelant, at least, the lights, themselves, bore no proximate relation to the accident, because the people on board the other [688] ship actually saw her when we were a mile away.

Mr. Wood: I am not going to be very long, your Honor. I only want to say this: The very fact that Mr. Young has stated, that the printed Pilot Rules do not define barges and scows, is the reason that the Department issued this circular official letter which does define them, and I think it is just as binding on the office and on the owners of the barges and scows as if you print it in these rules. It is an official letter and a decision with a definition by the Supervising Inspector General of this Service in Washington.

The Court: While we are on the subject of lights, the two white lights on the mast of the Barry K having been referred to as showing that she had barges——

Mr. Young: Yes, she was pushing barges, your Honor.

The Court: ——or the lighters——

Mr. Young: That is right.

The Court: ——in tow——

Mr. Young: No. May I correct that? If it had been a tow that was being pulled—that is to say, a log raft—then there would have been three lights.

Mr. Wood: I think not less, unless it was a hawser more than six hundred feet long. Is not that correct?

Mr. Young: No, that is the old rule. That has been changed. There is no question of the length.

The Court: Those things are all in the Pilot Rules, are they? [689]

Mr. Young: Yes, your Honor.

The only point I want to clarify in your Honor's mind now is that the two lights that were above the pilot house in this case showed that we had one or more barges that were lashed to the boat that were being pushed.

Mr. Wood: Not necessarily pushed. They might have been alongside.

Mr. Young: One of them was alongside, but I mean in contact with the boat. If it had been a tow behind with a long hawser, then there would have been three lights there.

The Court: You say "barges" for want of a better term?

Mr. Young: Yes. I prefaced that when I made my remarks that you have to have some word, and that is the most convenient one.

The Court: Does the Captain need to come back? I have ruled that a copy of that may be put in evidence.

Mr. Wood: He has to bring that record back.

The Court: I mean on this point, now. Is he needed on the stand now further?

Mr. Wood: I really do not know. When I read this letter which your Honor has admitted, I think you might want to ask something about it. I think inasmuch as your Honor has admitted this letter I should read it to your Honor now. It is a circular letter——

The Court: It must be in your favor, Mr. Wood. I did not think it necessary to read it. I shall be glad to hear it. [690]

Mr. Wood: “From recent correspondence that the Bureau has had in connection with definitions for barge, scow and lighter, it has occurred to the Bureau that the report adopted by the Board of Supervising Inspectors at its recent session covering these definitions might be of assistance to you, and the same is quoted below:”

The Court: The date of the letter, Mr. Wood.

Mr. Wood: June 20, 1929.

“The communication submitted states in part as follows:

“ ‘Requests the Board of Supervising Inspectors to define barge, lighter, and scow, and prescribe lights to be carried by lighter, in tow of steam vessel’ and is replied to as follows:

“ ‘DEFINITIONS

“ ‘Barge A barge is a type of vessel of ship-shaped superior construction being fitted with a rudder and constructed for the carrying of cargo under deck. It has no motive power of its own. Living quarters are

provided for the crew, who attend to the steering, pumping, etc., incident to the voyage.

“ ‘Scow A scow is a flat-bottom structure of broad beam and square ends and is generally used to transport mud, coal, garbage and like cargoes. It might be termed as of inferior type of construction. It does not carry cargo below deck and is of an open body type. It is without steering gear or control of its own.

“ ‘Lighter A lighter is a broad beamed, flat-bottom craft, one type decked from end to end and the other type is fitted with a superstructure. Upon both types, no rudder is provided for steering control. By interpretation of intent as to the carriage of lights, it is set forth as a ruling by the Commissioner of Navigation and Supervising Inspector General, under date of March 26, 1923, file No. 3819 that a lighter is an inferior type of vessel as comparable with barges and canal boats. [691]

“ ‘Therefore your Committee reports that it is of the opinion that lighters should carry as follows, as prescribed for scows, namely:’ ”

Then to quote the rule applicable to scows.

In other words, this letter classes lighters and scows as the same, and says that the Pilot Rules applicable to scows are applicable to lighters.

Will you make a copy of that (speaking to reporter)?

Mr. Young: Will you make an extra copy for me, please?

The Court: Do you have other witnesses, Mr. Wood?

Mr. Wood: No, I did hope to get one, but I was not able to find him.

The Court: Then when the Captain brings the record back and we bring that controversy to a close, that ends your case in chief?

Mr. Wood: I think it will.

The Court: You can come back in fifteen or twenty minutes.

A. Yes, sir.

The Court: Do it as quickly as you can and we will recess until you return.

The Court: And will you have anything in rebuttal this morning, Mr. Young?

Mr. Young: I think so, your Honor, yes.

The Court: Is this your last witness?

Mr. Wood: Yes.

The Court: We will recess this hearing, now, until the [692] Captain returns.

(Witness withdrawn.)

(Thereupon at 9:45 o'clock A.M. a recess was taken.)

The Court: Come up, Captain, please.

CARL A. ANDERSON,

resumed the stand as a witness in behalf of the Respondents, and, having been previously sworn, further testified as follows:

Direct Examintion

(Continued)

The Court: Captain, you are familiar, of course, with the type and severity of the penalties and the number that are recommended by the Inspectors in collision cases? A. Yes, sir.

The Court: How does that run in a year, the instances growing out of collisions, where disciplinary recommendations are found necessary?

A. Oh, I should say seven or eight cases.

The Court: Seven or eight a year?

A. Yes, sir.

The Court: Well, that involves, of course, a wide variety of craft?

A. Yes, sir.

The Court: Collisions as serious as this one we are dealing with in this case, there are not a great many of them, are there?

A. No, sir. Probably one every year, probably.

[693]

The Court: And what are the maximum and the minimums, if any, that the Board, under the statute and regulations, may recommend? I suppose a permanent suspension of the pilot's license?

A. Yes, sir.

The Court: That is the maximum?

(Testimony of Carl A. Anderson.)

A. Yes, sir.

The Court: And is there a minimum?

A. One day.

The Court: That is the minimum. Have there been any permanent suspensions in your experience?

A. No, sir. Not to my knowledge.

The Court: About how do they run, usually? Just call off a few of them.

A. Sixty days, ninety days.

The Court: Now, you continue your questioning, Mr. Wood, about his records, please, if there are any further preliminary questions.

Mr. Wood: I just wanted him to produce the record.

Q. You have brought it, have you, Captain?

A. Yes, sir.

Q. In that case of the Modoc?

A. Yes, sir. Tidepoint.

Q. Will you please——

The Court: Now,—— [694]

Mr. Young: Pardon me. Are you now formally offering the record?

Mr. Wood: Yes, I am offering it and asking that it be submitted to his Honor.

Mr. Wood: The Libeant objects to the record upon the grounds that we specifically enumerated earlier this morning.

The Court: Yes.

(Testimony of Carl A. Anderson.)

Mr. Young: I assume your Honor is overruling the objections or taking it under advisement.

The Court: No, I am going to admit it subject to the objection, Mr. Young. I have not made up my mind now as to whether I should consider this as part of the record or not. I think I should follow the practice which is not uncommon in these cases and other cases tried without a jury of admitting it subject to objection, so even though I should conclude—I will, of course, read it to the extent necessary to make up my mind on its admissibility and as to whether I shall feel it competent in the case, so that I may consider it in making my decision. I have not made up my mind as to that. So the ruling is, it is admitted subject to the objection.

Mr. Wood: Would your Honor care to have the witness——

The Court: Now, a practical question arises about this man's originals. They do not like to leave those here, usually, particularly this kind of a department.

Mr. Wood: I do not think there is any objection to leaving [695] it here for a reasonable length of time, is there, Captain?

A. No, sir.

Mr. Wood: It is in the custody of the Court.

The Court: Very well.

(The record, so offered, was admitted in evidence, subject to Libellant's objections and marked Respondents' Exhibit 15.)

(Testimony of Carl A. Anderson.)

Mr. Young: If the Court please, subject to the general objection which I made to the admissibility of the record at all, if the matter is to be in the record I have no objection to a copy being substituted for the original, the only difficulty in this case being that the record is rather voluminous.

The Court: I thought perhaps it was.

Mr. Wood: If it becomes necessary to copy it, if your Honor decides to admit it, I think we could probably——

The Court: I have admitted it now subject to the objection, so it is in the record permanently.

Mr. Wood: I think counsel and I could agree, subject to your Honor's approval, to having what we might regard the pertinent parts of it copied. I do not think it is necessary to copy it all.

Mr. Young: All being subject to the objection, we can probably make the agreement.

The Court: I think—any further questions from the Captain? [696]

The Court: Are there any other penalties permissible by law or regulation other than suspension or cancellation of a pilot's license? Are there fines?

A. Violations and fines; yes, sir.

The Court: And fines?

A. Yes, sir.

The Court: What are the maximums and minimums?

A. Two to three hundred dollars, page 10 of the Pilot Rules.

(Testimony of Carl A. Anderson.)

The Court: Is it customary to assess fines?

A. Cite them for violations; yes, sir.

The Court: That is rather usual, is it?

A. Yes, sir.

Mr. Wood: Q. Where there is no loss of life, however, the disposition of the Inspectors is to be pretty lenient, is it not?

A. Well, they make—they cite them for violation and it goes to the Bureau, and the Customs, they collect the money.

Q. But you did not get my question. I say, where there has been no loss of life the disposition of the local Inspectors is to be pretty easy on the offending pilot, is it not? A. Oh, yes, sir.

The Court: That is all, Captain.

Mr. Wood: That is all.

Mr. Young: Just a moment, Captain. [697]

Cross Examination

By Mr. Young:

Q. To your knowledge, has there ever been an investigation conducted by your Board with reference to the propriety of any particular lights carried by barges, scows, or lighters in the river?

A. Offhand, no, I don't know, sir.

Q. You do not know of any? A. No, sir.

Q. If it had occurred since 1937, during the time that you have been with the local board, you would probably know about it, would you not?

A. Yes, sir.

Q. Captain, with reference to this record which

(Testimony of Carl A. Anderson.)

the Court, subject to the objection, has admitted in evidence, regarding the collision between the Tidepoint and the Modoc, does your Board give any notice of that decision to anyone other than the parties involved? A. That is right.

Q. Just the parties? A. Yes, sir.

Q. And in the case of this Modoc, then, the only people that received any formal notification from your office about it would have been the two pilots who were involved there. Is that right?

A. Yes, sir.

Mr. Young: That is all. [698]

Mr. Wood: That is all, Captain.

The Court: Thank you, sir.

Mr. Wood: Thank you very much.

(Witness excused.)

Mr. Wood: That, your Honor, is our case. I would think that we have not produced and do not intend to produce the assistant engineer who was on watch in the engine room in the *Pennsylvanian*, because no question is involved. The testimony has been that all orders to the engine room were promptly carried out, and he is no longer in the employ of this company. In fact, I do not know where he is. And neither shall we produce this man who was referred to as the standby man. I do not know where he is, but Captain Vaux tells me he is no longer with the ship. Is that correct, Captain?

Captain Vaux: That is right; yes, sir.

Mr. Wood: So with that explanation,—

Mr. Young: As long as counsel has made a statement, your Honor, on the point, I should like to inquire of counsel as to what effort he has made since the time of the accident to keep in touch with these men. Counsel has known that an accident involving substantial damage took place and that, presumably, there was going to be litigation, and I should like to inquire as to what effort he has made to keep in touch with these men. [699]

Mr. Wood: I have never regarded a standby man of any importance and made no effort. The assistant engineer, I have communicated with the head office in San Francisco and they have informed me of the facts I have stated.

Mr. Young: What do you have to say about the man who was at the wheel of the Pennsylvanian?

Mr. Wood: The same thing. He is no longer in their employ, and I do not think his testimony is of the slightest importance. The helm orders were all obeyed. That is uncontradicted. There is no question, here, of helm, no question of the ship going the wrong way, in which she was not intended to go.

Mr. Young: He was up in the pilot house looking at the Barry K, was he not?

Mr. Wood: It would be presumed he was giving his attention to the helm and the orders that he got.

Mr. Young: In any event you cannot produce him.

Mr. Wood: That is correct.

Mr. Young: You have made no effort to obtain depositions of any of these men that are not present, have you?

Mr. Wood: No, but if you would like me to, and regard it of any importance, and the Court would like me to do it, I will try to get their depositions if you want them and the Court says it must be done.

Mr. Young: They are not going to be my witnesses. They are your witnesses. It is for you to determine. [700]

Mr. Young: If the Court please, yesterday when Captain Vaux was upon the witness stand, I brought out on cross examination that a man by the name of Wayne Swearingen was the lookout on the Pennsylvanian, and it was not known where he now was and he would not be produced as a witness. Opposing counsel at that time offered to permit the use of the testimony of Wayne Swearingen before the local Inspection Board and I at that time made a qualified acceptance of his offer on the theory that I would be willing to have that part of the transcript read to the Court, thought it should not be binding upon the Libelant. Counsel then stated that his offer was an unconditional one. Do I understand that offer is still open?

Mr. Wood: Yes.

Mr. Young: At this time, then, I accept——

Mr. Wood: You can read his whole testimony.

Mr. Young: At this time I accept the offer un-

conditionally and ask leave to read it to your Honor.

The Court: You will not need to copy it. You can put it in as an exhibit, can you not, Mr. Young?

Mr. Young: I will have to have it made. This is the entire transcript. But I shall be glad to have that done.

LIBELANTS' EXHIBIT No. 16

"WAYNE SWEARINGEN,

Route 2, Box 474, Jacksonville, Florida, being first duly sworn, testified as follows:

"Chairman Hill:

"Q. Do you hold a Federal license or Certificate?

"A. Identification Certificate Z 199145; and Certificate as [701] Ordinary Seaman, Wiper, Messman and Utilityman E-227946, issued Jacksonville, Florida, November 19, 1940.

"Inspector Joachims:

"Q. Were you employed as Lookout on the S.S. Pennsylvanian when that vessel collided with the tow of the steamer Barry K on February 1, 1941? A. Yes.

"Q. Where were you stationed?

"A. On the bow.

"Q. How long had you been there before the collision?

"A. Went on about 12:10 a.m.

“Q. And the collision occurred about 12:55 a.m.? A. Yes.

“Q. When the Pennsylvanian was proceeding down the Willamette River and you first saw the Barry K, about how far away was she?

“A. About a mile.

“Q. What lights did you see on that vessel?

“A. Saw white lights.

“Q. Did you see her side lights?

“A. No, sir.

“Q. How many white lights did you see?

“A. A bunch of them.

“Q. You saw white lights only?

“A. Yes, Sir.

“Q. Hear any signals?

“A. Yes, heard whistles from the Barry K.
Both ships.

“Q. What was the first whistle you heard from the Barry K?

“A. I don't remember.

“Q. Was it one blast or two blasts?

“A. I don't remember. Couldn't see.

“Q. What was the first whistle from your own ship?

“A. Wouldn't be able to say.

“Q. But you did hear whistles?

“A. Yes, I heard whistles. [702]

“Q. When the two vessels became very close to each other, and you were standing on the bow just before the collision, could you tell how they were in respect to one another?

“A. No, I could not. Except that the barge was coming across in front of us.

“Q. Port or starboard side? A. Port.

“Q. Did you see any lights on the barge?

“A. I think there were lights on it. I wouldn't say for sure.

“Q. What lights were they? What color?

“A. I wouldn't be able to say.

“Q. Whereabouts on the barge do you believe you saw the lights?

“A. On the corners.

“Q. Were they white lights?

“A. I don't know.

“Q. Were they on the top or side of the barge? A. Don't remember.

“Q. Could you tell how far from the top of the deck they were? A. No, Sir.

“Chairman Hill: When you saw the lights approaching up the river, did you notify the bridge?

A. I did.

“Q. Any questions by parties at interest?

“(None)

“Witness excused.”

[Endorsed]: Filed Jul. 23, 1941.

Mr. Wood: I also allow counsel to introduce in evidence the testimony before the Inspectors of the helmsman, Mr. Meagher, who is not here, and of the third assistant engineer, if he deems it of any

importance. I also offer to let him use the assistant engineer's bell book which is also here.

Mr. Young: The very kind offer of counsel is hereby rejected.

The Court: What bell book? [703]

Mr. Wood: The bell book kept in the engine room. In fact, those are all included, of course, in the offer I made to put in the whole testimony before the Inspectors, on which your Honor reserved ruling.

The Court: I think we ought to have the bell book in if we have the one on the bridge in.

Mr. Young: Are you referring to the bell book that has already been testified from by the witnesses, Mr. Wood?

Mr. Wood: I am referring to the bell book kept in the engine room.

The Court: You suspected the other one was.

Mr. Wood: I offer it.

Mr. Young: It is subject to objection by the Libelant on the ground that the man who made that book is not here available to be cross examined.

The Court: You are talking about the bridge bell book?

Mr. Young: No; I understand the engine bell book.

The Court: I know what I am talking about. I am talking about the bridge bell book, and that is the one Mr. Wood was talking about, are you not?

Mr. Wood: The bridge bell book——

The Court: It is not in evidence.

Mr. Wood: Yes, and I am very glad to offer it.

The Court: It is admitted.

(The Bridge Bell Book so offered and received was marked Respondents' Exhibit 17.)

Mr. Young: I do object to the bridge bell book. I misunderstood counsel. [704]

The Court: Is there any way to identify the engine room bell book?

Mr. Wood: It was identified in the testimony before the Inspectors, and, of course, a copy of it is in the Inspectors' transcript and might be compared with this original.

The Court: Mr. Young objects to it on one ground for want of identification.

Mr. Wood: I do not know how it could be identified otherwise, but I will ask these gentlemen.

Captain Vaux says he can identify it.

The Court: What other grounds of objection do you have?

Mr. Young: The principal ground of objection, your Honor, is not the one which your Honor just mentioned but rather that since the man who made this book is not here to testify it is impossible to question him in regard to it.

Mr. Wood: May I say a word, your Honor? I am not pressing the introduction of this book. I offered it to counsel. If he wants to have it in it can go in——

Mr. Young: I have not asked to have it in.

Mr. Wood: —in connection with the testimony before the Inspectors, which he can also have. It is immaterial to me, if he wants it or if your Honor wants it.

The Court: Are there any inconsistencies in that book?

Mr. Young: I have never seen his book.

Mr. Wood: You have seen a copy in the Inspectors' office. [705]

Mr. Young: I am sorry.

The Court: Is it so a white man can read it, or has it some of those hieroglyphics? I am interested, as a matter of justice and good sense, in seeing whether it conforms to the bridge bell book.

Mr. Young: If your Honor please, if the man who kept that book were here I, of course, would have no objection to its going in. I do not know what the book says and I, for that reason, am objecting to it.

The Court: And you do not want to read it?

Mr. Young: Yes, I will read it.

Mr. Wood: Those hieroglyphics, you understand, are standard.

The Court: You can check it with the other book between now and the next session, Mr. Young.

Mr. Young: Just offhand, it does not mean anything to me, because it has a set of hieroglyphics, or symbols, I think counsel called them, that—

Mr. Wood: Mr. Young, you have a copy of the investigation of the Inspectors, including, I think, a copy of that book. If you want to compare that with this you will see what they mean.

Mr. Young: I am sorry, Mr. Wood. I do not have. However, I will look this book over and see what I make out of it.

Is that all for the time being on that point, your Honor?

The Court: I just want to remind you that there is a very broad Federal statute permitting records kept in the course of [706] business that are self-proving. You will find it in 28 U. S. C. A., and it does not seem to me that your objection is sound, that the keeper of the record is not here to be subject to cross examination, in view of that very liberal statute and the very liberal application that has been given to it by the United States Supreme Court and lesser Federal courts.

Mr. Young: That liberal statute to which your Honor refers, however, has not changed the rules of evidence, so far as I know. What that statute has done is simply to declare certain documents to be public records——

The Court: No, no. I am not talking about a public record statute at all.

Mr. Young: You are talking about a different statute?

The Court: I am talking about the model course of business statute that is being enacted all over the United States. We have one here in Oregon, have had for years. It is commented on very favorably by Wigmore way back in his earlier editions. That was followed five or six years ago or longer by a Federal statute, and it says in plain words that

any record established to have been kept in the course of business is admissible for whatever probative value the tryer may give to it.

Mr. Young: The only point I am making is, your Honor, that I am seriously urging on this point, that as a matter of fairness it is perfectly obvious that if a record of this sort goes in unexplained and there is no possibility of examining the man [707] that made the record, the opposing party naturally is placed at a very serious disadvantage.

The Court: If you are not familiar with that statute, will you take a look at it, please, between now and the next session?

Mr. Young: Does your Honor have the citation conveniently there?

The Court: I can find it pretty soon.

Mr. Young: I have two short rebuttal witnesses that I can put on at this time, your Honor.

The Court: Yes. Do that, please.

Rebuttal [708]

WM. A. REED,

recalled as a witness in behalf of the Libelant, in rebuttal, testified further as follows:

Direct Examination

By Mr. Young:

Q. Captain Reed, I don't recall whether you testified on this, but do you carry a pilots license to operate ocean-going vessels? A. No, sir.

(Testimony of Wm. A. Reed.)

Q. You do not? A. Well, yes, I do.

Q. And what ocean-going vessels?

A. American vessels.

Q. And have you made application to become a member of the Columbia River Pilots' Association?

A. I have.

Q. When did you make that application?

A. Oh, about ten years ago, approximately; about ten years ago.

Q. Have you ever been admitted to membership?

A. No, sir.

Q. Captain, there has been some testimony in this case to the effect that persons on board the Pennsylvanian observed what have been described as white deck lights on the Barry "K" just before the accident occurred. Will you state whether or not there were any deck lights, white or otherwise, on the Barry "K"? [709]

A. No, sir, there were not.

Q. What is meant by the term "deck lights"?

A. Well, it is a string of lights on the outside of the house, which they use for working on log rafts or barges after night.

Q. Now, examining Libelant's Exhibit 5, could you point out to the Court the position where deck lights would have been had the Barry "K" been equipped with them?

A. Yes, sir, I can. They would have been right along underneath the edge of this deck, right along the house.

(Testimony of Wm. A. Reed.)

Q. The underneath part of the deck to which you are referring would be about how far above the water line?

A. About eleven or twelve feet, anywhere from ten to twelve feet.

Q. I see. And do I understand that you did not have any such lights on the Barry "K"?

A. No, sir, there is none.

Q. And that would be true of both the starboard and port side? A. Yes, sir.

Q. In so far as white lights were concerned, were they confined to the two mast lights to which you have testified? A. Yes.

Q. And to the lights on the barges?

A. Yes, sir.

Q. Captain, do either of these boats that we have called barges, numbers 22 or 24, have a rudder?

A. No, sir. [710]

Q. And did either of them have crew's quarters?

A. No, sir.

Q. There has been some testimony in this case, Captain, that men in the pilot house of the Pennsylvanian, when they observed just your two white mast lights and either the red or the green side lights, were not from those able to determine whether your boat was on the east or the west side of the river. I will ask you to state whether or not there are any other guide lights of any sort along the river there which would be of assistance to persons on the Pennsylvanian that night in determining the position of your boat?

(Testimony of Wm. A. Reed.)

A. Well, I think Post Office Lower light would indicate that.

Q. Post Office Lower light? A. Yes, sir.

Q. And are there lights on the east side of the river which would be of assistance in that regard?

A. Post Office No. 3.

Q. No. 3? A. Yes, sir.

Q. And is there any guide light downstream on the west side which would be of assistance to persons on the bridge of the Pennsylvanian?

A. I don't know whether they could see Gillihan's or not from their position at that time. If they could have seen it, it would have been. [711]

Q. To what extent at all would the white deck light—or I mean white lights on the corners of the barges, as you testified to previously, have been of assistance to persons on the Pennsylvanian in determining your course or position?

A. Well, the two white lights on barge No. 24 would perfectly line up with the hull of the Barry "K".

Q. Captain, there has been some question raised here as to the practice of towing barges through the bridges in Portland, that is, a vessel with two or three barges in tow would go through one side of the draw. Have you had that experience yourself? A. Yes, sir.

Q. And in pushing barges through the draws in Portland, what is the practice with regard to the speed at which you proceed?

(Testimony of Wm. A. Reed.)

A. Well, I would say when we have two barges, I would just get along at the ordinary rate, and if I had three, I would start and drift, and I have backed up to line up for them. It is pretty hard to get in position sometimes the way the bridges are located in the river.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Captain Reed, do you mean to testify now—I just want to see if I get your intent right—that the man on the bridge of the Pennsylvanian up here, which I think you said was 4,000 feet away from you at the first sight—is that what you said?
[712]

A. It was more than that.

Q. A mile?

A. A little better than a mile.

Q. A little better than a mile away. At that time they were a mile away and you said that you couldn't tell the relative position in the river of the Pennsylvanian from where you were, didn't you?

A. I said she was on the range.

Q. As it appeared to you? A. Yes.

Q. But you said you couldn't be certain of that, didn't you?

A. On the range and approximately about where I drew the cross.

Q. On your direct testimony, didn't you say that

(Testimony of Wm. A. Reed.)

she appeared to you to be on the range, but you couldn't—you thought so because that is the way they usually came, but you really couldn't tell which way she was, on the north—I mean the east or the west side?

A. Well, I said she was coming down on the range; I think that is my answer—wasn't it?

Q. I thought you said she appeared to you to be coming down the way they usually come, which is on the range, but that you couldn't tell her position in the river except her distance away from you.

A. I don't know whether I used those expressions or not.

Q. Isn't that a fact?

A. I don't remember. [713]

Q. I say, Isn't it a fact—never mind what you testified to before—when you saw her a mile away?

A. Yes, sir.

Q. You thought she was coming down on the range because that is the way they usually come; isn't that a fact?

A. That is the way they usually come, yes.

Q. And that is why you thought she was there; isn't that a fact?

A. Yes.

Q. But you couldn't tell in the darkness how much she was to the right or left in the river, could you?

A. I know approximately what distance they keep off that light up there.

Q. Yes. You know what they usually do?

A. Yes, sir.

(Testimony of Wm. A. Reed.)

Q. But you couldn't tell that night except from your knowledge of what they usually do where she was in the river, to the right or left, could you?

A. She looked just the same as they always did coming down there.

Q. I know, but just answer my question. You couldn't tell that, could you? You knew she was about a mile away from you; did you know whether she was on the range or to the left of the range or to the right of the range?

A. Not right on it, no; I couldn't tell.

Q. You couldn't tell that, no. All right. Now, I will ask you this: Do you want the Court to believe that the man up here [714] on the Pennsylvanian could look down the river a mile away, see your ship coming around the bend, and tell which side of the river you were on?

A. Yes, sir.

Q. Do you want the Court to believe that?

A. Absolutely.

Q. How would he tell?

A. I would be closer to Post Office Bar No. 3 than I would be to Post Office Lower, wouldn't I?

Q. I don't know. It would depend on how far down the river you were.

A. Well, according to my position on the chart that I checked.

Q. Yes, but do you think the man on the Pennsylvanian can tell, looking down at you, whether

(Testimony of Wm. A. Reed.)

you are this far up the river or that far up the river, or this far up the river?

A. I ain't saying what they can tell.

Q. I thought Mr. Young asked you whether a man in the position on the Pennsylvanian looking down couldn't tell where you were, to the right or left of the river?

A. I said they could.

Q. Now, I asked you why, how?

A. Because I would be closer to Post Office Bar No. 3 than I would to Post Office Lower right here.

Q. Where is Post Office Bar No. 3?

A. Right there. [715]

Q. Right there? A. Yes, sir.

Q. And is this Post Office Lower?

A. Yes, sir.

Q. What is the distance between them?

A. Well, twelve or thirteen hundred feet, I should judge.

Q. Well, it is pretty near fifteen hundred, if you want to measure it.

A. Well, that ain't a bad guess.

Q. Will you accept my statement that it is nearly fifteen hundred feet—it is over fourteen hundred feet from that light to that light?

Mr. Young: You might try measuring it.

Mr. Wood: Yes, I will be glad to. You measure it, Captain. There seems to be some disinclination to take my statement. Over there.

A. Is that about right?

Q. It seems to be, yes.

(Testimony of Wm. A. Reed.)

A. Is that the feet up there?

Mr. Young: Here.

A. (Continuing) I will have to get my glasses. It is right close to fifteen hundred feet.

Mr. Wood: Q. Yes. So is it your contention that a man on the Pennsylvanian seeing you a mile away, somewhere between lights that are fifteen hundred feet apart, can tell from that [716] fact which side of the river you are on?

A. Yes, sir.

Q. Now, you marked the place of collision right there where I am pointing, didn't you?

A. Yes, sir.

Q. Was that an accurate marking?

A. As near as I could tell when it was dark.

Q. How accurate was it?

A. Oh, I should judge it was near as I could tell.

Q. I know, but give us something better than that? A. I didn't make no soundings.

Q. Well, you have got a light right here to look at only a few hundred feet away from you; not over seven hundred feet away there is a light there, isn't there? I pointed to the wrong place, excuse me; right here, I mean. A. Yes, sir.

Q. Post Office Bar Lower? A. Rear.

Q. Rear, yes. A. That sets in the trees.

Q. That light was a whole lot closer to you than these lights were to that fellow up there, weren't they? A. Oh, yes.

(Testimony of Wm. A. Reed.)

Q. How close could you mark the place of collision? A. As near as I did. [717]

Q. You knew the place of collision was going to be pretty important, didn't you?

A. Why sure. That is the reason I took observations.

Q. Yes, and you marked it as close as you could?

A. Yes, sir.

Q. How accurately have you marked it?

A. As near as I could.

Q. Well, how much might it vary from its actual position?

A. Oh, it wouldn't vary over fifty, I don't judge, fifty feet.

Q. That is within fifty feet, is it?

A. Something like that.

Q. All right. That is what I wanted to know. Thanks.

Mr. Young: Just a moment, Captain. Take the stand.

Mr. Wood: Oh, no, I want to ask him something else on another subject.

Mr. Young: You had another question, did you say?

Mr. Wood: Yes.

Q. You testified about deck lights?

A. Yes, sir.

Q. On the Barry "K". I think the other witnesses, when they spoke of them, spoke of them as deck lights or cabin lights, house lights?

(Testimony of Wm. A. Reed.)

A. House lights.

Q. Were there any cabin lights showing from the windows of the Barry "K"? [718]

A. No, sir.

Q. What? A. No, sir.

Q. How about lights from the engine room of the Barry "K"?

A. They sit right up next to the ceiling and there is about eighteen inches of a hang-down on the house below those lights.

Q. I know, but the interior of the "Barry "K" is lighted, is it not? A. Yes, sir.

Q. It wasn't all dark, was it?

A. No, sir.

Q. It was light in the engine room, wasn't it?

A. Yes.

Q. The doors were partly open, weren't they?

A. I presume they were.

Q. So the illumination from that window would show out into the darkness, would it not?

A. It would not be a direct light.

Q. No, no; I know. But the illumination would show on a dark night, wouldn't it?

A. I presume it would.

Q. And the same about the windows from the house? A. What house?

Q. The cabins of the Barry "K"?

A. Yes, I suppose they would. Reflections, I would say. [719]

Q. Certainly, yes. You said you had applied

(Testimony of Wm. A. Reed.)

ten years ago to be a member of the Columbia River Pilots' Association but they had not taken you in?

A. No, sir.

Q. You do belong, however, to the same union that they belong to, do you not?

A. One of them.

Q. Local 17? A. Yes, sir.

Q. All the members of that Pilots' Association belong to Local 17, don't they?

A. I think they do.

Q. And all of the river men who have testified here on your side of the case belong to it, don't they? A. Yes, sir.

Q. In fact, you can't get in the Columbia River Pilots' Association nowadays unless you belong to union local 17, can you? A. I do not know.

The Court: Well, the converse is true; you can't get into the union unless you are a pilot either, can you?

Mr. Wood: Yes, you can get into the union. The union is broader than the Pilots' Association. It takes in river boat mates and men of that kind, does it not?

A. Yes, sir.

Mr. Young: Is that all, Mr. Wood?

Mr. Young: Yes. [720]

Redirect Examination

By Mr. Young:

Q. Captain Reed, how did the height of the deckhouse on barge No. 22 compare with the height

(Testimony of Wm. A. Reed.)

of the doors in the forward part of the Barry "K" at the point of the engine room; that is to say, were they lower or higher?

A. Well, the barges were higher.

Q. And what effect would that have upon the visibility to persons forward of the lights in the engine room?

A. You couldn't possibly see them.

Q. Couldn't possibly see them? A. No.

Q. Now, if at the time that the Barry "K" was first visible to the Pennsylvanian, the red light of the Barry "K" was visible to the Pennsylvanian, which side would that indicate was toward the Pennsylvanian? A. The port side.

Q. And would barge No. 24 then in any way interfere with the view which persons on the Pennsylvanian would have of any lights in the engine room? A. Yes, sir.

Q. Captain, at the time that this collision occurred, what was your judgment then as to the approximate distance that the Barry "K" was from the east shore at that point of time?

A. Oh, I would judge about six hundred feet.

[721]

Q. From the east shore, the Barry "K"?

A. Five to six hundred feet.

Q. Where did the collision occur with reference to the east shore of the river?

A. Oh, out about two hundred.

Q. Two hundred feet? A. Yes.

(Testimony of Wm. A. Reed.)

Q. And in placing a mark upon the map, was it your intention to place that at a point approximately two hundred feet from the east shore?

A. Yes, sir.

The Court: Q. What water do you think you were in?

A. Well, I figured I was in about twenty-one feet of water. That jumps up very quick there to about ten or twelve feet.

Mr. Young: Q. Do you know what the width of the river is where the depth is only ten or twelve feet, against the east shore?

A. I couldn't say.

Q. You don't know what that strip is, how wide it is?

A. About 200 or a little less.

Mr. Wood: I don't think it is at all rebuttal, but I don't care if he wants to recall him.

Mr. Young: The question was simply prompted by a question put by the Court. That is all.

Recross Examination

By Mr. Wood: [722]

Q. Captain Reed, what were you referring to just now when you said that the Barry "K" was six hundred feet from the east shore at the time of the collision?

A. No, when I first seen the Pennsylvanian.

Q. Oh, no, that wasn't what he asked you.

A. I misunderstood the question.

Q. You said six hundred feet or five hundred feet?

(Testimony of Wm. A. Reed.)

A. I misunderstood the question then.

Q. What did you mean?

A. I understood him to ask *him* how far the Barry "K" was from the east shore when I first sighted the Pennsylvanian.

Mr. Wood: That is all.

Mr. Young: That is all, Captain.

(Witness excused.) [723]

E. P. WILLIAMS,

was recalled as a witness in rebuttal in behalf of the Libelant, and, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Young:

Q. Captain Williams, at the time that this accident happened, state whether or not the Barry K was equipped with any deck lights or cabin lights.

A. No, sir; not any outside lights.

Q. Not any outside lights? A. No, sir.

Q. Were there any lights from the interior of the ship that you know of which were casting their rays out beyond the confines of the ship?

A. Well, there might have been a light, a dim light, showing out of the engine room, aft; that is, it possibly might show out, not bright.

Q. In view of the circumstances, that Barge 22 was on the nose of the Barry K, would that in any

(Testimony of E. P. Williams.)

way interfere with the view which persons on the Pennsylvanian would have of a light in the engine room?

A. Well, Barge 22 is straight ahead. They might have possibly saw a light being inside of the boat—that is, a slight reflection outside.

Q. The evidence from the Pennsylvanian, the men on the [724] Pennsylvanian's bridge, is to the effect that the first running light of the Barry K which they saw was the red light. That would mean that the port side was toward——

A. The port side; yes, sir.

Q. ——was toward the Pennsylvanian, was it not?
A. Yes, sir.

Q. Would the position of the two barges on the forward nose of the Barry K and on the port side forward in any way interfere with this engine room light being visible to the Pennsylvanian?

A. If they saw a red light I do not think they would see any other lights on the Barry K, except her running lights.

Q. And by "running lights,"——

A. In that position.

Q. By "running lights," you mean which?

A. I mean the green lights, the red light on the port side, and the masthead lights over the pilot house.

Q. Captain, there has been some testimony on behalf of the Pennsylvanian that the men on the bridge, when they first saw the Barry K, were un-

(Testimony of E. P. Williams.)

able to determine the position which she occupied on the river with respect to whether it was toward the east or the west side. What would be your judgment as to whether there was a possibility of the Pennsylvanian's officers' determining the position of the Barry K at that time?

Mr. Wood: I object to that question. It is too broad. "Possibility." Of course, anything is possible. The question is, [725] what is reasonably probable, or something like that.

Mr. Young: There has been testimony on the part of the Pennsylvanian that since you did not have lighted a forward range light, that they could not determine the position of the Barry K, whether it was on the east or west side of the river.

Mr. Wood: That is not the position. We never made that contention. We have said that because of the lack of a forward range light we could not tell the angle of approach of the Barry K, or it might have that effect. I do not know whether it did or not.

Mr. Young: You are confining it to the angle of approach rather than the position on the east or west side. Is that right?

Mr. Wood: The testimony will have to speak for itself, but I will say, frankly, that I do not see how the presence or absence of a forward range light would help us or deter us from determining her position on the east or west side of the river. I do not see how it would have that effect.

(Testimony of E. P. Williams.)

Mr. Young: You do not think it would have anything to do with it. Very well. That narrows the issue.

Q. Captain, are there any other lights on either the east or west side of the river at or about this place which would have been of assistance to the men on the *Pennsylvanian* in helping them determine whether the *Barry K* was on the east or west side of the river?

A. Yes; if the vessel was up as far as Post Office Bar lights, [726] Post Office Bar Light No. 3, and the Lower Post Office Bar light on the west side, if she was up that far, between the lights.

Q. Well, the testimony by the *Pennsylvanian* is that they were just coming off Post Office Range at the time that they first observed the *Barry K*. Now, in that position, are there lights there along the river which would be of assistance to them in determining the position of the *Barry K*?

A. I will say if a vessel coming upstream was up near or abreast of either one of those lights, she could determine which one she was closer to, which side of the river she was on.

Q. Now, the evidence is that the *Barry K* was just below Post Office Bar 3 at the time that the *Pennsylvanian* was either on or just coming off the range in the positions indicated by these two marks.

A. Here is what I was referring to.

Q. Louder, so the reporter can get it.

(Testimony of E. P. Williams.)

A. I was referring to Lower Post Office light and this light, here.

Q. Post Office Bar 3? A. Yes, sir.

Q. Do I understand, then, that the Lower Post Office Bar light and Post Office Bar 3 light would be of assistance to the men on the *Pennsylvanian* in determining whether the *Barry K* was on the east or west side of the river?

A. If a vessel was coming upstream and they were close, anyways near abreast, it could be determined much easier than it could [727] if she was way below.

Q. Assume the *Barry K* is in the position indicated by this cross mark to which I am now pointing, and I am pointing to the mark "*Barry K* Reed 1st sight." Assume that is the position of the *Barry K* at the time that the *Pennsylvanian* is up in the position indicated by the other cross mark at the upper end of Post Office Range.

A. Well, I refer to this as to whether you were down here in position—I don't know where the *Pennsylvanian* was——

Q. Assume where I said, Captain.

A. Well, that is quite a ways.

Mr. Wood: Does your Honor want to see this? You cannot see it from where the witness it. Here is a pointer.

A. I couldn't say——

Mr. Wood: Maybe the Court would like to see it.

(Testimony of E. P. Williams.)

Mr. Young: Q. Can you run a straight edge now from the position of the Pennsylvanian, as indicated on the map, down to Post Office Bar Lower light?

A. No, sir. If the Pennsylvanian was up that far she couldn't judge the distances as to where the Barry K was as well as if she was down lower. I said if she was down this far on the range. The farther down she was, and if there was any vessel coming up, it would give her a better chance to get the distance.

Q. From the position indicated by the map, with the Pennsylvanian being as I am now indicating, could the men on the Pennsylvanian see Post Office Bar Lower? [728]

A. She is too far away.

Q. Too far away? A. I would say so.

Q. But as she gets farther down the range, then, as I understand, they can see that light?

A. Yes, sir.

Q. So that at a later point, there would come an opportunity for them to check the position of the Barry K with Post Office Lower light. Is that right? A. That is it.

Q. Would the same thing be true of the position of Post Office Bar 3 light?

A. If the vessel was coming down as she approached, if there was a vessel coming up, especially if she was between the lights, then she could de-

(Testimony of E. P. Williams.)

termine which one she was the closer to, or which side of the river she was on.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. And if she is not between the lights, Captain,—just let the Court see. You keep the pointer. If the ship was further down the stream, she would appear to a vessel up here closer to this east light, would she not, than to this light?

A. Yes, sir; she would.

Q. And as she comes up the stream, her position changes in relation [729] to the two lights, and she appears to be more in the middle between them, does she not?

A. If she was coming up the middle river, she was——

Q. I mean her relation to the lights changes all the time as she comes up the river. A. Yes.

Mr. Wood: Certainly. That is all.

Redirect Examination

By Mr. Young:

Q. What is the purpose, Captain, of those lights, such as Post Office Bar 3 light and Post Office Bar Lower? A. They are as a guide.

Q. And what do you mean by “guide”?

A. To tell you how far off shore. You gauge your distance off the shore line.

Q. And to assist you in determining the distance other boats may be off the shore?

(Testimony of E. P. Williams.)

Mr. Wood: That is too leading, too suggestive.

Mr. Young: Q. What is the fact in that regard?

A. I say they are to guide you, the vessel, coming either direction, to determine your distance off the shore line. They are not a range light.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [730]

Mr. Young: Those are all that I have here, your Honor, at this time.

The Court: The Federal statute that I refer to is 28 U. S. C. A., Section 695. You will find it in the pocket supplement enacted in 1936, and you should note these two decisions in the second circuit, very liberally applying the statute, one, 15 Federal 2d, 492, and one 17 Federal 2d, 387.

What other questions have been reserved that we might deal with at this time?

Mr. Wood: You say "What other questions?"—

The Court: Have been reserved that we might deal with at this time?

Mr. Wood: The question we are dealing with at this time—I am a little confused on that. You mean the transcript of the testimony from the Inspectors?

The Court: No. What other questions may we have reserved that we can——

Mr. Wood: Well, you reserved the question of whether the record before the Inspectors in this Barry K-Pennsylvanian collision was admissible.

The Court: Neither side offered it. You may have at my invitation, almost request. I do not want to put you in the wrong position on the record. You were not offering it on your own initiative, were you?

Mr. Wood: No, I did not. [731]

The Court: All right.

Mr. Wood: But I will offer——

The Court: At this stage I am not asking anything of you about it or suggesting anything of you about it. Is there anything you desire to do about it?

Mr. Wood: On my own initiative I would offer their final decision, not necessarily all of the testimony, but their decision in the case.

The Court: Well, in view of the United States Supreme Court decision 115 U. S., that has been produced. I feel that I must reject it, although that is contrary to practice, both in this court and Judge Fee's court.

Mr. Erskine B. Wood: Would not some more of these statutes, though, passed since that Supreme Court decision, make that admissible as a Government record? I think that is a Government record.

The Court: They might.

Mr. Erskine B. Wood: I think that Supreme Court case in 115 U. S. is considerably antedated.

The Court: Of course, generally, we do not consider anything binding more than 300 U. S.

Mr. Erskine B. Wood: I know a case to be argued over there. *He* admitted against me a doc-

tor's report, merely a doctor's opinion in writing, merely because he was consultant of the United States Public Health Service and he had written them a [732] long opinion, two or three pages, on the condition of the man, because that was a part of the United States Public Health records.

The Court: That grows out of the war risk decisions, a very broad rule that has been developed.

Mr. Erskine B. Wood: Although it was not a war risk case. I think he admitted.

The Court: As I am presently advised, in view of the decision in 115 U. S. I will reject the offer of the decision.

Mr. Wood: I am not renewing any argument. I merely want to make my position perfectly clear, because I value my position before the Court more than I do in any one case. I, myself, share Mr. Young's doubts as to whether this whole transcript of testimony is admissible in evidence except by way of impeachment. I think that may be right. I have offered it in the first instance really on your Honor's suggestion.

The Court: That is right.

Mr. Wood: And I also offered it as to any of my own witnesses who testified before the Inspectors and who were not here, like this third assistant engineer. I have told Mr. Young if he wants to use it for that purpose he can have it, or any such witnesses. But on the question of the final decision, I rather think that that is admissible, because I do not think pilots here in this river ought

to be put in the position of having the local Inspectors decide one way how that channel should be navigated, [733] and the Court, without knowing what their decision was, decide in some other. Now, I do not mean that that decision——

The Court: I know pretty well, after listening to both of you for six days, and I think the record will pretty near give me something to stand on, the statements that both of you have made, and your witnesses, as to what the decision was. It would be pretty hard to try this case without putting into the record what the decision was.

Mr. Wood: It is. And I want it for the sake of making my position clear in this and future cases also. I do not think their decision is binding on your Honor. I agree with Mr. Young on that. Your Honor could decide differently, but I think their decision is strongly advisory.

The Court: Well, you know how timid we are about precedents. We have the one precedent in Louisiana Federal District Court that was offered in the Chandler case by Messrs. Wood. They grounded it under the Federal documents rule, under the Federal statute as to public documents. Now, we have proceeed through the industry of Mr. Maxwell, I have no doubt, the decision in 115 U. S., apparently a direct opinion.

(Mr. Erskine B. Wood nodded his head.)

The Court: I want the record to show that "Yes", it apparently is a direct opinion, as I may need his help at some later stage of this case. Now,

we have this decision in the Supreme Court of Louisiana in 1941 A. M. C. page 44, point 3, which Mr. Maxwell [734] produced, and you gentlemen have not had an opportunity to look at that. I have been looking at it during the morning and you have not had that chance. Hand it to them now, Mr. Maxwell.

Mr. Maxwell: Is that 1940?

The Court: 1941. Hand them the lower court decision. The lower court decision in 1940, A. M. C., page 1001, followed Judge Bond's decision. The Supreme Court of Louisiana reversed them without, however, I notice, commenting on Judge Borow's decision. Maybe one was a Long man and another an anti-Long man, and he did not feel like mentioning the name. Ordinarily you would expect him to. He makes some reference to the Federal Judge's decision. So that is the sum total of the precedents. I will see Judge Fee in the course of the day on other matters, and I am going to ask him again, as I have previously, what have been the precedents in his court on this point, Mr. Young and Mr. Wood, just to refresh my recollection as to what he has said about that. So I will make a further statement about it in the morning.

Now, we have a letter, here, I call it, a copy of the report that the pilot on the Pennsylvanian filed with the Inspectors, which you offered as a narrative, Mr. Wood, to supplement the Captain's testimony.

Mr. Wood: I did, and I also offered it today

again as confirming Captain Norberg's testimony that he had referred to that to refresh his memory on one point, and it changes the testimony he [735] first gave, a document used to refresh his recollection.

The Court: Now, do you persist in your objection to its introduction, Mr. Young?

Mr. Young: Yes, the document was not in any way used to refresh the recollection of the witness at the time that the document was offered. The witness testified of his——

The Court: Pardon me an interruption. You made a very good statement before as to your position. I think you had better look in the books if you deem that serious, between now and tomorrow. What has happened here is that the Captain has been called back and corrected his testimony.

Mr. Wood: Correct.

The Court: And Mr. Wood is offering now a report which the Captain made at the time, which is in line with the corrected testimony.

Mr. Wood: Right.

The Court: Now, you will find a discussion on that in Wigmore, I am sure as to whether the statement made at the time is admissible under those circumstances by way of explanation of how the inconsistency happened to develop and to strengthen the second and corrected testimony.

Mr. Young: Do I understand your Honor is speaking now in terms of *res gestae*?

The Court: No.

Mr. Young: I see. [736]

The Court: I am not going to have the time, and, I am pretty sure, the energy, to look that up, but you might do it if you want to. Ordinarily a man takes the stand, Mr. Wood, and tells his one story, just one story, and you ask him if he has a report in his pocket that he made, and you offer the report. We do not admit the report—we say it is self-serving—and he has been on the witness stand and told his story there; but I think you should think of this in terms of the special circumstances here present, Mr. Young. You may want, sometime, yourself, to back up a witness who has had to refresh himself—you not only try these cases for the occasion before us, but they make precedents, especially for a man with such a good memory as you have.

Mr. Young: I am glad to know that. I did not realize that I had such a good memory.

The Court: What else do we have around here?

Mr. Young: There is one matter that I omitted to ask Captain Williams when he was on the stand. I should like to recall him for just a moment.

Captain Williams.

E. P. WILLIAMS

was recalled in rebuttal as a witness in behalf of the Libelant, and, having been previously sworn, testified further as follows:

Further Direct Examination

By Mr. Young:

Q. Captain Williams, subsequent to February 1,

(Testimony of E. P. Williams.)

1941, when the [737] Barry K had her accident with the Pennsylvanian, how long did you continue to pilot boats for the Western Transportation Company, either act as pilot or Master?

A. Master about thirty days.

Q. About thirty days?

A. After that time.

Q. Now, during that period of time did you have occasion to go past Post Office Bar with any one of these three boats, the Barry K, the Claire, or the Patricia?

A. The Claire.

Q. The Claire? A. Yes, sir.

Q. Were you Master of the Claire at that time?

A. Master; yes, sir.

Q. And how many times did you go past Post Office Bar in that thirty-day period, would you say?

A. Well, we were by there twice each day. I would be on watch probably once.

Q. And state to the Court which side of the river you used in proceeding past Post Office Bar.

A. I used the east side of the river.

Q. That is the same as you had previously?

A. Yes, sir.

Q. Did you receive any instructions from anybody to make any change in the manner in which the boats should proceed past Post Office Bar following that accident? [738]

A. I received no instructions.

Mr. Young: That is all.

(Testimony of E. P. Williams.)

Cross Examination

By Mr. Wood:

Q. About half of the time you passed Post Office Bar in that thirty days, you were not on watch?

A. I was not on watch; no, sir.

Q. And half of the times that you were on watch you were going downstream, were you not?

A. Downstream and possibly it was late. I can't just recall. I might have been on watch coming in, possibly two or three times out of that period.

Q. You might have been on the west side coming in?

A. No, sir. I wouldn't have been on the west side.

Q. What did you say? You might have been what?

A. I might have been on watch. It might have come on my watch coming in.

Q. Are almost all of your watches going out?

A. On the Captain's watch, most all of them is going out.

Q. Going out, yes. So that really in that thirty days there would be few occasions where you, while on watch, would bring the vessel upstream?

A. Yes, there would be very few occasions.

Mr. Wood: That is all. [739]

Redirect Examination

By Mr. Young:

Q. Captain, during the time when you were not on watch, who would have been in the pilot house?

(Testimony of E. P. Williams.)

A. The pilot.

Q. I mean, what was his name?

A. Spencer, I believe it was, with me, and the balance of the time I was there.

Q. In other words, either you or Spencer would have been in the pilot house on all of those trips past Post Office Bar? A. Yes, sir.

Mr. Young: That is all.

(Witness excused.)

Mr. Wood: To return to your Honor's discussion of what things were left in reserve, of course there is the matter of that engine room bell book, which I am not pressing. I do not care about it. Personally, I think it would probably make a more complete record of the case if it goes in.

Mr. Young: I am going to check the book, and if I have any different ideas in the morning I will advise you on it.

The Court: You might have Captain Hazelwood identify it now.

Mr. Wood: It is Captain Vaux.

The Court: What was that section number in 28 U. S. C. A. I [740] gave you?

Mr. Maxwell: 695 in the supplement, your Honor.

(The engine room bell book of the Pennsylvanian was marked Respondents' Exhibit 18 for identification.)

EARL B. VAUX

was recalled as a witness in behalf of the Respondents, and, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Wood:

Q. I hand you this book that has just been marked by the reporter, and ask if you can identify it and say what it is. Look at it; look at the entries.

A. Yes, sir. I can identify it. It is the engine room log book of the Pennsylvanian.

The Court: Bell book?

A. Yes.

Mr. Wood: Q. It is not the engine room log book; it is the engine room bell book?

A. An error on my part. It is the engine room bell book; yes, sir.

Q. And what is the purpose of an engine room bell book?

A. It is to take all of the bells given from the bridge and their time is kept of the half-minute in the engine room.

Q. Are the entries made at the time? [741]

A. Yes, made right at the time; yes, sir.

Q. What is the practice? Does the man on watch obey the order and then make the entry, or what? A. Yes, sir.

The Court: Is this the engine room bell book that was in use at the time of the collision?

(Testimony of Earl B. Vaux.)

A. Yes, sir; it is. I called for that bell book at that time after the collision, and that is the bell book.

Mr. Wood: I offer in evidence page 25 of this bell book.

The Court: I will reserve ruling as to that until tomorrow morning when we hear further from Mr. Young.

Mr. Wood: Pardon me, your Honor. I should like this witness to put into the record an explanation of these symbols, or was that done?

The Court: The engine room bell book?

Mr. Wood: They use the same symbols.

The Court: The other one was explained on the stand.

Mr. Wood: There it is, if your Honor is satisfied to read it.

The Court: I am not interested in it at the present time. Mr. Young is the one that is wondering whether there is anything hurtful or helpful in it.

Mr. Wood: I wanted to show you the symbols. I am just avoiding having an incomplete record in the case. That is always distasteful. But, Captain, I want to ask you a question or two.

Q. It is customary on the Pennsylvanian as well as other boats [742] to make such a record in the engine room of bells at the time of receiving the signals from the bridge? A. Yes, sir.

Q. And who was on watch at that time?

(Testimony of Earl B. Vaux.)

A. Mr. Sairanen.

Q. Do you happen to know his handwriting?

A. I couldn't identify his handwriting; no, sir.

Q. Whom did you get the book from?

A. From the chief assistant engineer.

Q. Who was on watch at that time?

A. He was not on watch at the time, no, sir. Any orders I had to give, it is generally through the chief engineer or the first assistant, and they are carried out from there rather than going to the individual man to get it, and he will bring that bell book up or log or whatever it happens to be.

Q. And how soon after the accident did you get it?

A. Upon arrival and return to San Francisco, due to the fact that the engineers wanted that bell book, for times and moves from Portland after the accident, that is, to the dry dock and shifting around the dry dock and down to Astoria, and then at that time I picked it up and put it in my safe, and then put it upon request in the dock at San Francisco.

The Court: You may not want to question about it, Mr. Young.

Mr. Young: Only one question I did want to ask. In whose handwriting do these notations appear? [743]

Mr. Wood: I was going to ask something about that myself, if you will permit me.

A. I couldn't swear whose handwriting it is, sir. I was told when I asked that it was Sairanen's.

(Testimony of Earl B. Vaux.)

Mr. Young: When you asked whom?

A. The first assistant.

Mr. Young: You do not know this handwriting, yourself?

A. I would not swear to it; no, sir.

Mr. Wood: Q. Captain, the engineer on watch is assisted by an oiler, is he not?

A. He is assisted by an oiler.

Q. So there are always two men there in the engine room at the time? A. Yes, sir.

Q. Well, it is not clear to me—does the engineer make these entries in the bell book, or does the oiler make them?

A. I couldn't be positive on that, myself.

Q. I thought it was the practice for the engineer to tend the throttle and so on, and the oiler to note them in the bell book.

A. It is a general practice; yes, sir.

Q. If that was so, then these entries would not be in Sairanen's handwriting, if he were handling the throttle? A. Presumably not.

Mr. Wood: That is all.

Mr. Young: No further questions at this time, your Honor.

(Witness excused.) [744]

The Court: You have nine witnesses tomorrow.

Mr. Young: It will be eight. One of them has been on the stand.

The Court: To examine briefly just as you did the Captain?

Mr. Young: Yes, your Honor. It is in regard to this matter as to what the practice has been since the accident.

The Court: You should get through with that in fifteen or twenty minutes.

Mr. Young: I should think so, yes.

The Court: I should think we could start at nine and finish the argument about noon. Now, as to the argument, there is nothing that has not been discussed pretty fully today and preceding days. The lights have been discussed pretty fully today.

Mr. Wood: Yes.

The Court: Your theories of custom have been discussed pretty fully, Mr. Young, by you. I do not mind hearing you again, but I am just running over the things that we have already covered pretty fully. Is either side going to want to brief the case after the argument? I will not decide it at the end of the argument. I will say that now.

Mr. Wood: That would depend on your Honor's wish.

Mr. Young: I think in this case it would be helpful to your Honor if we did submit briefs. We might take the word "brief" seriously. That is something lawyers do not ordinarily do, but if the word "brief" is taken seriously and a comparatively short memorandum filed, I think it would be an assistance to your Honor. [745]

Mr. Wood: We might submit a memorandum of authorities or something like that.

Mr. Young: May I inquire as to whether your Honor will expect to rule on these matters that are still up in the air prior to the time that we make our arguments?

The Court: What are they.

Mr. Young: The matter of the introduction of the transcript is one point.

The Court: Which transcript?

Mr. Young: The transcript of the proceedings before the local Inspector.

The Court: Yes.

Mr. Young: That is the most important matter, I think, that your Honor has not passed on.

The Court: As present advised, I am going to exclude it now. Now, what else?

Mr. Young: That was the main point I had in mind.

The Court: The transcript of what, do you mean?

Mr. Young: The transcript of the proceedings before the——

The Court: The evidence, or the transcript of the findings?

Mr. Young: Well, all, the whole thing. I understood your Honor had definitely ruled with regard to the findings, that you have now ruled those out. That would leave, of course, the balance of the transcript which consists of testimony and colloquy back and forth between—— [746]

The Court: Consider the evidence out.

Mr. Young: Consider the evidence out?

The Court: Yes. Now, unless something further is urged on me about the decision in the morning I will exclude that——

Mr. Young: I understand.

The Court: ——unless my talk with Judge Fee as to the prior practice in his court as well as mine here should cause me to change my mind. I shall have that talk with him during the day. Now, what else besides that?

Mr. Young: I do not think of anything further, as far as matters of rulings are concerned, at this time.

The Court: I might ask you, Mr. Young, what points you expect to dwell on in your argument tomorrow. Could you not just state them as points now?

Mr. Young: I would rather not be bound by what I would say today as to the precise scope, because one point I had in mind in asking your Honor was that I might give myself a little additional time to graft together all of the various threads of the evidence. Naturally, we will discuss the questions of custom and the matter of lights and the matter of last clear chance and negligence of the pilot of the Pennsylvanian.

The Court: Rather to my surprise there is nothing said about divided damages in the case.

Mr. Young: It is stipulated that that would not be determined, nothing introduced at this time, your Honor. [747]

The Court: Oh, no. That is not what I mean.

I did not say the amount of damages. I said the doctrine of divided damages, whether or not this is a case to be considered on the basis of possibly dividing the damages in some proportion. I say it again: rather to my surprise it has not been suggested as an alternative position as it usually is in these admiralty cases by either side. In other words, this appears to be a fight to the death, whole hog or none, of one side or the other prevailing.

Mr. Young: That is certainly the impression that one would gain from examining the pleadings, I should say, your Honor. As to what your Honor does with the case, of course, that is something else.

The Court: There are cases, I suppose, where fault has not been found on either side.

Mr. Young: Well, as I understand the law, your Honor, on the point, there are four possible decisions in an admiralty case, where there is a libel and a cross libel. One of them is that neither recovers from the other, due to the fact that there is no fault found either way. The other is that libelant recovers in full from respondent. The other is respondent recovers in full from libelant, and the final possibility is that it is a case of mutual fault where the damages are lumped together and split fifty-fifty.

The Court: Oh, fifty-fifty.

Mr. Young: Those are the only possibilities that I know [748] anything about.

The Court: Is this a fifty-fifty case?

Mr. Young: That is for your Honor to determine.

The Court: Wait a minute now. You said "fifty-fifty." If this were deemed to be an apportionment of damages case, it would be fifty-fifty. Is that one the only possible proportion?

Mr. Wood: Are you asking me?

The Court: Anybody that will answer.

Mr. Wood: I think in a proportionment of damages, the usual rule is, divide them equally, but there have been exceptions to it, and in cases of tugs and tows, they divide it into thirds and fourths.

Mr. Young: Well, counsel is referring, I think, to cases where there are more than two parties involved. If there were three parties involved you might have that situation. I think the law on that point is under the European rule, as decided by a conference, held in 1910. It was determined that in an admiralty case the Court was at liberty to divide up the damages in any way that it saw fit. The American courts, however, have not followed the European rule, but, as I have understood, have confined their holdings to the rule that if the libelant does not recover in full from the respondent, or respondent in full from the libelant, then recovery of all the damages are simply split fifty-fifty.

The Court: Is that right, from your point of view?

Mr. Erskine B. Wood: Not just entirely. The damages, as I [749] understand it, your Honor, are divided equally among the number of vessels at

fault, if there is more than one vessel at fault. It is fifty-fifty where there are two vessels, but if three vessels are at fault it would be thrity-three and a third apiece. If four vessels are at fault it would be twenty-five per cent apiece; and of course where you have a tug and tow the various members of the tow are considered as a separate vessel. That is pretty well settled. If they are at fault, as individual vessels, why you might get it a division of damages into more than two parts, if all were at fault.

The Court: You would say there were four vessels to be thought of in this case, two tows and a tow boat and a steamer?

Mr. Erskine B. Wood: Yes, there were really four vessels involved in this collision.

Mr. Young: I make my next statement, your Honor, subject to further check between now and tomorrow, but it is my understanding that the rule about division on a basis other than fifty-fifty is dependent upon there being more than two separate, distinct vessels involved. I take it the Barry K—I had assumed it would be treated as one vessel,—that is, those two boats that were with the Barry K, whatever they are, barges, scows, or lighters, all add up together into one boat. However, counsel having made that statement, I want to check its accuracy.

The Court: Then we will adjourn until 9 o'clock in the morning.

(Thereupon, at 11:35 A. M., Court was [750] adjourned until tomorrow, Wednesday, July 23, 1941, 9 o'clock A. M.) [751]

Wednesday, July 23, 1941, at 9 o'clock A. M., pursuant to adjournment, the following proceedings were had:

Mr. Young: I should like the record to show that I am now supplying the court reporter with a copy of the transcript of the testimony of Wayne Swearengen, which was read to your Honor yesterday. He was the lookout on board the Pennsylvanian.

Mr. Wood: That has been checked with the transcript of the Inspectors' record.

Mr. Young: Yes, the girl at the office did that. I should be glad to have you check it also.

Mr. Wood: I will check it later.

ARTHUR WILLIAM FIDLER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. I am a river Captain, marine Captain.

Q. And what license do you carry?

A. Captain and a pilot also.

Q. In what waters?

A. Columbia River and the Willamette as far as Oregon City and [752] the Columbia as far as Cascade Locks.

Q. And how long last past have you held those licenses?

(Testimony of Arthur William Fidler.)

A. I have held them for twenty-two years.

Q. Are you at the present time in the employ of the Western Transportation Company?

A. Yes, sir; I am.

Q. In the capacity of Captain?

A. Yes, sir.

Q. And how long have you held that position with that company?

A. Twenty-one years and a half.

Q. Captain, I will ask you to state whether or not since February 1 of this year you have been Captain of the Barry K at any time?

A. Yes, sir; I have.

Q. Have you also been Captain of the Claire?

A. Yes, sir; I have, and at present am.

Q. And have you had anything to do with the boat called the Patricia?

A. I haven't been on the Patricia.

Q. Not since February 1? A. No, sir.

Q. Are you familiar with Post Office Bar?

A. Very familiar. I have had occasions to pass there very often.

Q. Will you state whether or not since February 1 of this year what has been the practice of yourself in operating either the Barry K or the Claire past Post Office Bar with respect to the side of the river which you followed? [753]

A. Well, in entering the mouth of the river I keep to the Post Office Bar side, which is the starboard side, and leave the deep-water ships have the starboard side, the left-hand side coming out.

(Testimony of Arthur William Fidler.)

Q. Is that true in going downstream also?

A. I keep to the right-hand side going out and leave them have the right.

Q. And has that practice been continuous by you since February 1 of this year?

A. It has always been my practice, before and after.

Q. Both before and after.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Do you pay any attention to whistle signals passing steamers there, Captain? A. Yes, sir.

Q. Why do you, if you are going to pass up on the shoal water side regardless?

A. Well, we blow our signal and it is answered and it is understood. When a signal is given and answered and understood we proceed to pass on the side.

Q. You do pay attention to whistle signals, then, do you not? A. Certainly do.

Q. In the daytime do you not only listen for the signals but watch for the steam blasts? [754]

A. Yes, sir.

Q. What?

A. Some of them are not steam. Considerable of the ships is the air whistles. You don't see any steam.

Q. Yes, I know, but it is the practice of careful

(Testimony of Arthur William Fidler.)

navigators, is it not, to watch for the steam blasts of the whistle of an approaching steamer?

A. They either watch for the steam or the sound of the whistle. We are always alert when we are passing ship.

Q. I say you are not only listening for the sound but you are watching for the steam blasts, are you not? A. Yes, sir.

Q. Why do you do that?

A. Well, it is just natural for you to stand there and watch an approaching ship.

Q. Have you any reason for watching for the steam blasts?

A. Sometimes if there is any disturbance of noise or anything, if you see the steam from the whistles you can detect whether they have blowed one or two.

Q. In other words, you watch for the steam blasts as an additional way to tell whether the whistle of the other ship is blowing one blast or two blasts, do you not? A. Yes, sir.

Mr. Wood: That is all.

The Court: Step down, Captain. [755]

Mr. Young: That is all, Captain.

(Witness excused.)

Mr. Young: Captain Stover, please.

THEODORE STOVER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

The Court: Mr. Wood might stipulate with you that, if called, these employes of the Libelant would also testify the same as the one that has just been on the stand.

Mr. Wood: How many of them are there?

Mr. Young: There are seven, I think, altogether, your Honor.

Mr. Wood: I do not think I can do that yet, your Honor.

Mr. Young: I will make them as short as possible, your Honor.

Direct Examination

By Mr. Young:

Q. State your occupation, please.

A. Pilot on the Columbia and Willamette rivers.

Q. And what license do you carry?

A. Master mate and pilot.

Q. Covering the Willamette and Columbia rivers?

A. Willamette and Columbia rivers. [756]

Q. And for river boats?

A. Yes, sir. To one thousand gross tons.

Q. How long have you held those licenses?

A. Six years, a little better.

(Testimony of Theodore Stover.)

Q. Are you at the present time in the employ of the Western Transportation Company?

A. Yes, sir.

Q. In what capacity? A. Pilot.

Q. How long have you been with that company? A. Thirteen years.

Q. In connection with your work for the Western Transportation Company, have you had occasion to pilot boats up and down the river past Post Office Bar? A. Yes.

Q. Captain, since February 1 of this year, have you piloted the steamer Claire at any time?

A. Yes, I have.

Q. And have you piloted the steamer Barry K at any time? A. Yes, I have.

Q. Have you piloted the Patricia at any time since February 1? A. No, I haven't.

Q. Since February 1 of this year will you state what has been your practice with regard to the side of the river which you follow in passing Post Office Bar with either the Barry K or the Claire?

[757]

A. I have made it a practice to keep on the east side of the river there, which is the left-hand side coming in and the right-hand side coming out.

Q. And that is whether you are going upstream or downstream? A. Yes, sir.

Q. Has there been any change in your practice in that regard since February 1 of this year as compared with prior to February 1?

(Testimony of Theodore Stover.)

A. No, there hasn't.

Mr. Young: Cross examine.

Cross Examination

By Mr. Wood:

Q. Have you known of the decision that the local Inspectors made in the case of Captain Reed growing out of this collision?

A. No, I don't know yet what decision they made.

Q. But you have just kept on coming up the east side?

A. Yes.

Q. Regardless of what that decision was?

A. Yes, sir.

Q. Do you pay any attention to whistle signals, passing steamers, there?

A. Yes, I do.

Q. Do you watch for their steam blasts as well as listen to them?

A. Yes, I watch for the steam blasts. If I am not sure if one or two blasts is blown, whichever they blow, I don't answer until it is properly understood what is blown. [758]

Q. And watching for the steam blasts helps you understand what the whistle has been?

A. Yes, sir.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

Mr. Young: Captain Spencer.

LANSING H. SPENCER

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Well, I am ten-day skipper and ten-day pilot.

Q. Employed by whom?

A. Western Transportation Company.

Q. How long have you been in that Company's employ?

A. Since the first day of March, 1933.

Q. And what licenses do you carry?

A. Master and pilot unlimited.

Q. In what waters?

A. Columbia River and tributaries. [759]

Q. How long have you held those licenses?

A. Since 1930.

Q. Captain, I will ask you to state whether or not since February 1 of this year you have been the pilot or Master of the steamer Barry K.

A. Yes, sir.

Q. And have you been the pilot or Master of the steamer Claire? A. Yes, sir.

Q. Have you been the pilot or Master of the Patricia? A. No.

Q. Since February 1 of this year have you had occasion to go down on Post Office Bar with either the Barry K or the Claire? A. Yes, sir.

(Testimony of Lansing H. Spencer.)

Q. You are familiar with that territory?

A. Yes. That is our daily run.

Q. Pardon? A. That is our daily run.

Q. Daily run. Will you state whether or not, during the time that you have gone over or past Post Office Bar since February 1 of this year, what has been your practice with regard to the side of the river that you follow at that point?

A. Well, we always keep the east bank.

Q. That is true going up and downstream?

A. Right.

Q. And has that been your continuous practice since February 1 of this year? [760]

A. That always has been.

Q. There has been no change in your practice since February 1, as distinguished from prior to February 1? A. No.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Do you pay any attention to whistle signals of approaching steamers there? A. Yes, sir.

Q. You do? A. Yes, sir.

Q. Suppose a steamer blows you a one blast. What do you do?

A. Well, it depends on the condition of the place we are in. If he blows us one whistle, we will probably—the only thing we can do is blow him down and blow him the danger signal if we are over to that side of the bank of the river.

(Testimony of Lansing H. Spencer.)

Q. You mean you insist on staying on what I will call the wrong side, regardless of what whistle you give?

Mr. Young: I object to that question, your Honor, as being argumentative.

Mr. Wood: I said what I thought.

The Court: Change it to read "on the east side."

Mr. Wood: East side.

Q. You insist on staying on the east side no matter what whistle [761] you get from another ship?

A. We never got any other whistle outside of á starboard whistle, two whistles. That is a standing rule amongst us.

Q. Amongst you? A. Yes, sir.

Q. You never blow anything but what kind of a whistle there?

A. Starboard whistle, which is two long blasts of the whistle.

Q. And if a steamer blows you one blast, you insist on going ahead on two blasts, do you?

A. I blow him a danger signal and then blow him two blasts, because I am over so far to the east side of the bank it would be impossible to pass me on the port side.

Q. You are over so far when you enter that place, according to your practice, that you cannot get over on the right-hand side. Is that what you mean?

A. No, we can get over there all right, but we

(Testimony of Lansing H. Spencer.)

are right in the bend and we have to be coming out of the bend to clear ourselves, which the ship coming down there would have to throw their stern into the bend on us. They are bound to throw us into the bank there.

Mr. Wood: All right. That is all.

Redirect Examination

By Mr. Young:

Q. Do you remember ever receiving——

The Court: He said he did not. He covered that.

[762]

Mr. Young: I wanted to ask him specifically with regard to ocean-going steamers, your Honor, as distinguished from other vessels.

Q. The whistles you always expect to receive at that point are what? A. Two whistles.

Q. And has that been your experience that you have always received whistles of that sort?

A. Yes.

Q. Irrespective of whether they are ocean ships or otherwise? A. Yes; right.

Mr. Young: That is all.

(Witness excused.)

RALPH R. ROSS

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Mr. Young: If the Court please, the first two

(Testimony of Ralph R. Ross.)

witnesses who were just on the stand, I took the liberty of excusing. They were required to go back to their ship. I assume that meets with your Honor's approval.

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Pilot, Columbia River. [763]

Q. And by whom are you employed?

A. Western Transportation.

Q. How long have you been with that company?

A. About eight years.

Q. As a pilot?

A. No, as pilot about two years.

Q. What license do you carry?

A. Master and pilot, Columbia River and Willamette.

Q. And how long have you held that license?

A. About two and a half years.

Q. I will ask you to state whether or not since February 1 of this year you had occasion to act as pilot or Master of the Barry K. A. Yes.

Q. Have you had occasion to act as pilot or Master since February 1 of the Claire? A. No.

Q. Since February 1 have you had occasion to act as pilot or Master of the Patricia?

A. Yes.

Q. Since February 1 have you had occasion to operate either the Barry K or the Patricia past Post Office Bar? A. Both; yes, sir.

(Testimony of Ralph R. Ross.)

Q. Both vessels. Since February 1, what has been your practice with regard to the side of the stream that you follow in passing Post Office Bar? [764]

A. There has been no change.

Q. Which side do you follow?

A. We always use the west bank.

Q. Always what?

A. Always use the east bank.

Q. You said "west," I think, a moment ago. Did you? Was that my mistake?

A. Yes, that was in error.

Q. You have used the east bank?

A. The east bank, yes.

Q. And is that the same practice that you followed prior to February 1? A. Yes, the same.

Q. Are you acquainted with a pilot or Master employed by the Western Transportation Company by the name of Beckett? A. Yes.

Q. And has he been with you on either of the trips that you have made with the Barry K or the Patricia? A. Yes, he has.

Q. He has been your——

A. He was Master and I was the pilot.

Q. He was Master and you were the pilot?

A. Yes.

Q. To your knowledge at any time while he was on watch did either the Barry K or the Patricia follow any course except the east side [765] of the river past Post Office Bar?

Mr. Wood: I object to that question as imma-

(Testimony of Ralph R. Ross.)

terial when it is qualified to his knowledge. This man was probably asleep while the Master was navigating the ship.

Mr. Young: Qualify the question to his knowledge?

A. To my knowledge he always followed the east bank.

Mr. Wood: What do you mean by your knowledge?

A. Any time I was up and he was on watch.

Mr. Wood: Part of the time he was navigating the vessel while you were asleep, was he?

A. Yes.

Mr. Wood: That is all.

The Court: Step down.

Mr. Young: That is all, Captain.

(Witness excused.)

LEWIS H. GILDEZ,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. What is your occupation, please?

A. Master and pilot.

Q. And in whose employ? [766]

A. Western Transportation.

Q. How long have you been with that company?

(Testimony of Lewis H. Gildez.)

A. About eighteen years.

Q. In what capacity?

A. As Master and pilot.

Q. What licenses do you carry?

A. Master and pilot.

Q. In what territory?

A. Columbia River and tributaries.

Q. Since February 1 of this year have you had occasion to pilot or act as Master of the Barry K?

A. No, sir.

Q. Or of the Claire? A. No, sir.

Q. Or of the Patricia? A. Yes, sir.

Q. Have you had occasion to proceed past Post Office Bar in either direction since February 1 of this year? A. Yes, sir.

Q. During that period of time what has been your practice with regard to the side of the river on which you have proceeded?

A. Travelled on the east side.

Q. At Post Office Bar?

A. The east side of the river.

Q. Is that true both going upstream and downstream? [767] A. Yes, sir.

Q. Has there been any change in your practice in that regard since February 1 of this year as compared with the period before February 1?

A. No, sir.

Q. Are you acquainted with a pilot or Master in the employ of the Western Transportation Company by the name of Beckett? A. Yes, sir.

(Testimony of Lewis H. Gildez.)

Q. Was he with you on any of these trips that you made since February 1?

A. On the Patricia.

Q. On the Patricia? A. Yes, sir.

Q. Since February 1? A. Yes, sir.

Q. Now, at times when he was on watch, to your knowledge, what has been his practice with regard to the matter of which side of the stream at Post Office Bar the Patricia would follow?

A. On the east side, to my knowledge.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. You have no real knowledge of it, have you?

A. I have seen him do it once or twice.

Q. And you also have been off watch and probably asleep at other [768] times when he was navigating the ship, have you not? A. Yes, sir.

Q. Did you pay any attention to whistles going through Post Office Bar channel?

A. Yes, sir.

Q. Why do you, if you are always going to pass on the left-hand side? A. The law says so.

Q. The law says you shall keep to the right-hand side, does it not?

A. It says if you blow two whistles you can take the other side, though.

Q. That is your interpretation of the law?

A. That is what it says in the book.

(Testimony of Lewis H. Gildez.)

Q. I think it does not, but all right. I will dismiss you.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

ELBERT DAVIS,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your occupation, please.

A. River pilot. [769]

Q. Employed by whom?

A. Western Transportation Company.

Q. How long have you been with that company?

A. Been employed there November, 1939.

Q. What licenses do you carry?

A. Master and pilot.

Q. What waters?

A. Columbia and Willamette River; also Snake River.

Q. And how long have you held that license?

A. Fourteen years.

Q. Captain, have you had occasion since February 1 of this year to pilot or act as Master of the Barry K past Post Office Bar in the Willamette River?

A. No.

(Testimony of Elbert Davis.)

Q. I will ask the same question with respect to the Claire. A. No.

Q. And the same question with respect to the Patricia. A. Yes.

Q. In operating the Patricia past Post Office Bar since February 1 of this year, which side of the stream have you followed?

A. The east side.

Q. And has that been your continuous practice since February 1? A. Yes, sir.

Q. Has there been any difference in your practice since February 1 and that which existed prior to February 1? [770] A. No, sir.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. Were you aware of the decision that the local Inspectors made in Captain Reed's case?

A. No, I know nothing about that decision.

Q. Your company never even informed you of it? A. No, sir.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

REUBEN W. CONFER,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. State your name, please.

A. Reuben Warren Confer.

Q. Just be seated. And where do you live?

A. Oswego; Oswego, Oregon.

Q. What is your occupation?

A. Operating manager for the Western Transportation Company. [771]

Q. Your office is in Portland?

A. That is right.

Q. And how long have you been with that company?

A. Well, I have been twelve years as the operating manager, but I have been with the paper company all my working days, as a matter of fact.

Q. How many years would that be?

A. Twenty-seven years.

Q. The twelve-year period to which you refer is the period last past?

A. That is right; with the Western Transportation as operating manager.

Q. As operating manager for the Western Transportation Company would you be the one to give any instructions to your masters or pilots, if any were to be given, with regard to the manner in which they should operate your boats past Post

(Testimony of Reuben W. Confer.)

Office Bar? I refer to the side of the river on which they should proceed.

A. If there were any such orders to be issued from our company, the Western Transportation Company, they would come through my department.

Q. And you would have knowledge of them yourself?

A. I would have personal knowledge of them myself.

Q. Yes. Now, state whether or not since February 1 of 1941 any such order or instruction has passed through your department with regard to the side of the river on which your boats should proceed [772] in passing Post Office Bar.

A. Absolutely none whatsoever.

Q. Now, are you a captain?

A. No, sir; I am not.

Q. Mr. Confer, you have been in the court room while a number of witnesses have testified on behalf of Western Transportation Company, have you not? A. Yes, sir.

Q. Now, will you state whether or not there have appeared on the witness stand this morning all of the pilots or masters of the Western Transportation Company who have either piloted or been masters of the Barry K, Claire, or Patricia since February 1 of this year?

A. All with the exception of one.

Q. And who is that?

A. Captain Beckett.

(Testimony of Reuben W. Confer.)

Q. And which one of the boats was he on subsequent to the first of the year? Do you remember?

A. Well, he has been on the *Patricia*, the *Barry K*, and the *Burton*, if you wish to——

Q. Yes, I am not interested in the *Burton*. He has not been on the *Claire*? A. No, sir.

Q. You have personal knowledge of the boats on which these various captains and pilots are stationed. Is that correct? [773]

A. That is correct.

Q. Where is Captain Beckett at the present time?

A. Captain Beckett at the present time, his family informs me, is at—up at Coulee Dam, or Soap Lake, some place.

Q. Up in Northern Washington?

A. He is off on his leave of absence, and he is away.

Q. Mr. Confer, to your knowledge have any of your boats in passing Post Office Bar used the west instead of the east side of the river?

A. Not to my knowledge.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. Mr. Confer, I assume as a matter of course you knew of the action taken by the local Inspectors in the matter of Captain Reed growing out of this collision, did you not?

A. That is quite true.

(Testimony of Reuben W. Confer.)

Q. Did you attend that investigation?

A. No, sir; I did not.

Q. You had Mr. Young attend it?

A. I am not positive on that, even. I rather think so.

Q. At any rate, you knew the result, you were informed of the result?

A. I was informed of the result, yes.

Q. But notwithstanding that, you took no action of any kind in [774] the way of issuing any instructions to your masters?

A. (The witness shook his head "No.")

Q. You shake your head.

A. No, sir.

Mr. Wood: That is all. Thank you.

Mr. Young: That is all.

(Witness excused.)

Mr. Young: If the Court please, yesterday when your Honor was inquiring as to how many witnesses I had I was thinking in terms of just the witnesses who would be testifying to the subject matter that you have heard. I do wish to call two experts for just short questions.

Mr. Wood: Is this rebuttal?

Mr. Young: Yes, this is rebuttal.

Captain Graham.

ORWIN G. GRAHAM,

produced as a witness in behalf of the Libelant in rebuttal, being first duly sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Where do you live, please?

A. Portland. [775]

Q. And what is your occupation?

A. Columbia River pilot.

Q. How long have you done that work?

A. A little over thirteen years.

Q. And what licenses do you carry?

A. Master and pilot's license.

Q. On what type of vessel?

A. Unlimited license.

Q. And does this include the Columbia and Willamette rivers?

A. Yes, sir. The Willamette as far as Oswego and the Columbia as far as Cape Horn and Astoria.

Q. Does that also include the piloting of ocean-going ships? A. Yes, sir.

Q. Is your work at present confined to the piloting of ocean-going ships? A. Yes, sir.

Q. And how long has it been so confined?

A. A little over thirteen years.

Q. And you have been doing that work in the Willamette and Columbia rivers?

A. Yes, sir.

Q. Captain, I will ask you to state whether or

(Testimony of Orwin G. Graham.)

not you know of any custom on any ocean-going ships which are being operated in or out of this port that the pilot upon hearing a whistle signal will confer with other officers on the bridge as to the identity [776] of that signal?

A. No, I do not.

Q. You know of no such custom?

A. No, sir.

Q. To what extent, if at all, do the pilots ever confer in your experience with other officers on the bridge about signals?

A. Well, occasionally why the mate will say that the ship blowed one or two whistles, but it isn't a common practice, but it is done occasionally.

Q. In event of some uncertainty on your part as pilot, what would you do then as to the identity of the whistles?

Mr. Wood: It is immaterial. I object to that. It is immaterial——

Mr. Young: Strike the question.

Q. Captain Graham, what is the practice with respect to whether or not ocean-going ships which are being piloted down the Willamette River to the Columbia customarily have on the forecastle head someone who is in charge of dropping anchors?

Mr. Wood: If your Honor please, that is not rebuttal. He did not go into that matter of anchors on his case in chief at all. He did not charge it in the libel. He did not ask one of his witnesses about it. He waited until some of our witnesses got

(Testimony of Orwin G. Graham.)

on the stand and then he simply asked if anybody was on there to drop anchors. That is not an issue in this case.

Mr. Young: If the Court please, that matter was discussed at [777] the time the questions were asked, and I thought we had the matter threshed out. The fact of the matter is, the libel charges that the *Pennsylvanian* did not slow down or did not stop, and when this question arose once before, as I pointed out, the matter of the use of anchors was simply one of the incidents in connection with the slowing down or stopping of the vessel, and your Honor permitted the testimony at that particular time, and it has been my understanding that it is definitely within the issues of this case. Obviously the question as to what was done on board the *Pennsylvanian* is a matter which was within the knowledge of the *Pennsylvanian* people rather than our own, and therefore the logical time for the specific questions in that regard to be asked arose at the time of the *Pennsylvanian*'s witnesses being on the stand.

The Court: He may answer.

Mr. Young: Read the question.

The Court: No. Just answer it. What is the custom about anchors?

Mr. Young: Q. Do you have the question in mind, Captain?

A. It is the general custom to keep a carpenter or a man capable of dropping the anchor until we get to the mouth of the Willamette.

(Testimony of Orwin G. Graham.)

Q. Is an ordinary seaman ordinarily regarded as being a person who is capable of dropping the anchors?

A. I can't recall ever of an ordinary seaman dropping an anchor.

Q. Captain, have you ever been a pilot on board the steamer [778] *Pennsylvanian* of the American-Hawaiian line?

A. Well, now, I was American-Hawaiian pilot. You understand that when the Columbia River pilots were doing their work, they had a certain number of men out of our group that piloted the American-Hawaiian—they didn't all handle them—and I was one of the American-Hawaiian pilots, to the best of my knowledge, for three or four years.

Q. And during what period was that?

A. Well, now, that I just can't recall. I would say perhaps four or five years back from the present date that they put on their own pilots.

Q. And do you remember whether or not you had occasion to pilot the *Pennsylvanian* at any time?

A. To the best of my knowledge I have, yes.

Q. Captain, there has been testimony in this case that the steamer *Pennsylvanian*, when traveling at seven knots an hour, going downstream, could, from the moment her engines reversed, stop in approximately one-half mile. That testimony is assuming that the anchor was not used. Assume,

(Testimony of Orwin G. Graham.)

however, that the anchor were used at the time the engines were put in reverse. What would be your opinion as to the distance in which that ship could stop with the anchor being dropped, going seven knots?

A. I would say approximately half the distance.

Q. There has also been testimony in the case that the Pennsylvanian travelling downstream at four knots an hour from the moment that [779] the engines were put in reverse could stop in approximately one-fourth of a mile. What is your opinion as to the distance in which that same ship could stop going four miles an hour if, when the engines were put in reverse, the anchor is also dropped?

A. Well, I would say that she would stop in less than a quarter of a mile, and in an emergency of that kind where a ship was travelling at the rate of four miles an hour, when the headway became slackened on the ship, a person could use both anchors very safely.

Q. Now, if you used both anchors, what effect would using two anchors have as distinguished from one, with regard to slackening the headway of the ship?

A. Well, it would stop her, I would say, with approximately twice the length of the ship.

Q. Now, what danger, if any, is there of losing the anchor in dropping it when the ship is travelling any speed from, say, four to seven knots?

A. There is a possibility of parting a chain at

(Testimony of Orwin G. Graham.)

that speed if the anchor would hook up on something solid, but if it didn't, with, say, fifteen fathoms of chain in the water, the ship would tow the anchor, drag it right along in the bottom.

The Court: How much is a fathom in feet?

A. Six feet.

Mr. Young: I am glad your Honor asked that question. I had forgotten what it was. [780]

The Court: Did he ever drop the anchor when a ship was going seven knots an hour or over?

Mr. Young: Captain, have you ever had the experience of dropping an anchor when the ship was travelling seven knots an hour or over?

A. Yes, sir.

Q. What ship was that?

A. That was the Jaeger Fontaine.

Q. What was her size? Do you remember?

A. Over five hundred feet long. I don't remember just exactly.

Q. Do you remember what her draft was?

A. Twenty-eight feet two, to the best of my knowledge.

Q. At what speed was she travelling when you dropped the anchor?

A. Well, we were going about fifteen and a half knots an hour and a heavy bank of fog shut down approximately, oh, three hundred yards ahead of us, and I stopped and put the ship full astern and backed her for possibly one minute, and then let go of the anchor, and she must have been going

(Testimony of Orwin G. Graham.)

approximately ten knots an hour at the time I let go of the anchor.

Q. And what was the effect of dropping the anchor under those circumstances?

A. She towed the anchor along and brought the ship to a stop and the tide was flooding and brought the ship to a stop—she would have sheared off—kept the ship straight. Understand ships back to port when you back them, and the anchor dropping, the port anchor, kept the ship on her course. [781]

The Court: How long does it take to get the anchor in the water when you give the order to drop it?

A. At that time there was a man on the fore-castle head ready to drop the anchor, and I would say it didn't exceed over a minute or a minute and a half.

Mr. Young: You may cross examine.

Cross Examination

By Mr. Wood:

Q. You were approaching a fog bank at the time, were you?

A. The fog came out from Jim Crow Point and blowed right down over the hill and shut right down on us, but there was indications of fog before that.

Q. How long before that?

A. Oh, I would say twenty-five minutes.

Q. Is that the reason you had the man on the fore-castle head? A. Yes, sir.

Q. It is not customary to keep a carpenter on

(Testimony of Orwin G. Graham.)

the forecastle head going down the Columbia River in clear weather, is it? A. No, sir.

Q. At many places on the Columbia River the channel is just as narrow as it is in the Willamette. Is not that a fact?

A. Well, you can see. You are not coming around on swings like you are at Post Office Bar and places like that.

Q. Will you please answer my question? Are there not many places on the Columbia River where the channel is just as narrow as Post Office Bar?

[782]

A. Yes, sir.

Q. And there are bends, too, are there not?

A. Well, there isn't any bends that correspond with the bend at Post Office Bar where you are coming on a continuous swing for any great distance.

Q. You do not know whether you have ever navigated the *Pennsylvanian* or not, do you?

A. I can't say positive, but I imagine that I have, because I was *American-Hawaiian* pilot for a period of three or four years, and I think that I was on nearly all of their boats with the exception of the *California*. I won't say that I was ever on her. I don't think I ever was.

Q. How long ago is that?

A. Well, now, I can't state. Four or five years. I don't remember just how long it has been since they put their own pilots on. Up to that time why

(Testimony of Orwin G. Graham.)

I was piloting the American-Hawaiian ships for a period of about four years, to the best of my knowledge.

Q. Do you say that it is your requirement that a carpenter or chief mate or somebody should be kept on the forecastle head all the time the vessels are going down the Willamette River?

A. Yes, sir.

Q. What requirement is that?

A. Well, it isn't a requirement; it is a custom, not a requirement. With any large ships. You don't do it with small ships. [783]

Q. The Inspectors do not make any such requirements.

A. No, they do not.

Q. Are you a member of the Columbia River Pilots Association?

A. Yes, sir.

The Court: Were you defendant in a case in this Court titled Errion vs. Graham about three years ago.

A. Yes, sir. Wait a minute. Well, I was a defendant in a case of Errion vs. Graham, but I don't know whether it was in this Court or not.

The Court: Any further questions?

Mr. Wood: No more.

Redirect Examination

By Mr. Young:

Q. You, personally, regard it as advisable for someone to be on the forecastle head who is competent to drop the anchor under orders from the bridge?

A. Yes, sir.

(Testimony of Orwin G. Graham.)

Q. In going down the Willamette River?

A. Yes, sir.

Recross Examination

By Mr. Wood:

Q. Have you ever been Master of an ocean steamer? A. How is that?

Q. Were you ever Master of an ocean steamer?

A. Never was, no. [784]

Q. What are you, a towboat man?

A. I have operated towboats for—well, since 1908 up to the time I went in the Columbia River Pilots, approximately that much. I wasn't—

Mr. Wood: That is all.

The Court: Step down, Captain.

Mr. Young: That is all.

(Witness excused.)

A. T. LOWERY,

was recalled as a witness in rebuttal in behalf of the Libelant, and, having been previously sworn, testified as follows:

Direct Examination

By Mr. Young:

Q. Captain Lowery, what can you say as to whether or not there is any custom on the Willamette or Columbia rivers of a pilot of ocean-going vessels conferring with other officers on the bridge

(Testimony of A. T. Lowery.)

as to the identity of any whistles which the pilot may hear? A. I never heard of it.

Q. Have you in your experience had occasion to confer with other officers on the bridge of any ship you might have been on with regard to what the nature of the whistle was that you might have heard?

[785]

Mr. Wood: I object to that as entirely immaterial.

A. Not to my knowledge.

Mr. Young: Q. Captain, what has been your observation with respect to any custom or practice of having someone on the forecastle head of an ocean-going ship who is competent to drop the anchor at any time while that ship is in the Willamette River?

A. I always asked for a mate or—or for a carpenter to be left on the forecastle head until we clear the Willamette River.

Q. Why do you do that?

A. For somebody there to handle the anchor and drop the anchor.

The Court: This was in the Willamette River?

Mr. Young: Yes, your Honor.

The Court: I was thinking within the city limits.

Mr. Young: It is outside the city limits, but it is within the Willamette River.

Mr. Young: Q. How far is Post Office Bar from the Columbia River? Do you remember?

A. Approximately three miles.

Q. How much?

(Testimony of A. T. Lowery.)

A. Approximately three miles.

Q. Now, Captain, would you, as pilot, rely upon the lookout on the forecastle head, who is, himself, an ordinary seaman, to drop the anchor in the event you found it necessary so to do?

A. No, sir.

Q. And why not? [786]

A. I don't think he is a capable man to handle the anchor.

Q. There has been testimony in this case that the steamer *Pennsylvanian* travelling downstream at seven knots an hour could, from the time her engines were put in reverse, stop in a distance of approximately half a mile. That testimony was assuming that the anchor was not dropped. What would be your opinion as to the stopping distance at seven knots an hour if the anchor were promptly dropped at the time the engines were put full speed astern?

A. Well, as to the *Pennsylvanian*, I couldn't say, but as to other ships that I have handled, some in the class of the *Pennsylvanian*, I would say it would be approximately a half of the distance, if he would use an anchor.

Q. Would you say that would be a principle that would be of general application to ocean-going ships?

A. I have always used it in case of an accident.

Q. Well, I meant, what is the effect of dropping the anchor on what otherwise would be the stopping distance of any ocean-going ship?

(Testimony of A. T. Lowery.)

A. I don't quite understand your question.

The Court: Would it stop quicker?

Mr. Young: Q. Would it stop more quickly?

A. It would.

Q. And is there any general principle that you have discovered as to how much more quickly it would stop using the anchor and [787] not using the anchor?

A. It depends a good deal on how much chains you give your anchor and if you have got an anchor down and your ship is going astern and you got out thirty fathom in the water she would stop approximately in half the distance she would stop without an anchor.

Q. Now, there has been testimony that the Pennsylvanian travelling at four knots an hour downstream could stop from the time her engines were put in reverse in a distance of one-fourth of a mile without the use of anchors. Assuming that the anchor were dropped at the time that the engines were put full speed astern, what would be your opinion as to the stopping distance then, at four knots?

A. The anchor was dropped immediately when the engines was put astern, I would say she would stop approximately in half the distance.

Q. With a competent man on the forecastle head, upon his receipt of the order from the pilot house to drop the anchor, can he proceed promptly in that regard?

(Testimony of A. T. Lowery.)

A. If the proper man was on the forecastle head, yes.

Q. How quickly after the order is given can he carry it into execution?

A. Probably half a minute, as a rule.

Q. What danger, if any, is there in dropping the anchor of an ocean-going vessel when it is travelling at speeds of, say, from [788] four to seven knots an hour?

A. Well, there is danger that it might hook up on something on the bottom and break your chain. Again, your chain may have a twist in it or half a turn in it and break.

Q. Well, in an emergency how much consideration would you give to that circumstance?

A. I wouldn't give it none.

Q. Have you personally had experience in dropping anchors on ships which are travelling at varying rates of speed? A. I have.

Q. And to what extent have you had that experience?

A. Well, I had Pat Donahue one night coming into Miller's Sands channel. The steering gear let go. She was making about eight knots on flood tide, let go the starboard anchor, wound up giving her thirty fathom in the water, the engines were put full astern at the same time, and stopped her before she hit the bank, a full, loaded oil tanker.

Q. What happened to the anchor?

A. We drug her home when we got the gear fixed up.

(Testimony of A. T. Lowery.)

Q. Have you had other experiences of that nature?

A. Yes. I had the Iowan one time out of the dry dock, taking her down the river. The steering gear went out five times between here and St. Helens, dropped the anchor five different times and kept her from going ashore.

Q. At what speeds was she travelling when you dropped the anchor? [789]

A. Well, she was travelling approximately seven to eight miles.

Q. Did you lose the anchor on any of those occasions? A. No, sir.

Q. Any other experience of that nature?

A. Well, I had the Larry Doheny one night, the steering gear let go on her and I stopped her with the anchors.

Q. What speed was she travelling?

A. Approximately six knots an hour coming upstream.

Q. All of the vessels to which you have just now referred are ocean-going ships?

A. Yes; two of them oil tankers, one of them a freighter.

Q. Captain, what difference, if any, is there in the effect of dropping the starboard anchor as distinguished from the port anchor on the direction of the ship?

A. Well, if you drop the port anchor——

The Court: Why are you going into that?

(Testimony of A. T. Lowery.)

Mr. Young: It has a bearing, your Honor, upon the testimony of Captain Norberg that he couldn't swing the bow of the Pennsylvanian around to port when she was headed to starboard. May the witness answer?

The Court: Yes.

A. Well, when you drop an anchor on a ship and your ship is steady, an anchor will have a tendency, if it is a port anchor, to pull her to port. If it is a starboard anchor she will have a tendency to pull her to starboard. [790]

Q. Is there any difficulty about dropping both anchors in an emergency?

A. Usually you drop them one at a time. You drop one and secure it and then let go the other one.

Mr. Young: That is all.

Cross Examination

By Mr. Wood:

Q. You say if the ship is on a steady course, if you drop the port anchor she will do what?

A. If a ship is on her steady course and you drop your port anchor it will swing the ship to port, to your left.

Q. Suppose she is already on a considerable swing to her right when you drop the port anchor. What then?

A. Well, it would have a tendency to kind of slow her up a little, but I don't know as it would slow her up a great deal if she is going astern.

Q. The chain from the port anchor, if the vessel

(Testimony of A. T. Lowery.)

was swinging to starboard, would pass underneath the vessel's bow, would it not?

A. Yes. Naturally.

Q. And as that vessel's bow was thus retarded by the chain, the vessel would swing more to starboard, would it not?

A. She would keep swinging to starboard——

Q. Her stern would be swinging free to the stern's port, would it not?

A. If you drop the starboard anchor, it pulls the head of the [791] ship to the right.

Q. Yes, and if you drop the port anchor with the vessel already on a starboard swing, she will still keep swinging to starboard, will she not?

A. She will swing some, until she tows that anchor straight with the ship, yes.

Q. If she is already on a swing to starboard and you drop the port anchor and thus retard the motion of her bow but let the stern keep on swinging, her swing is going to be increased by dropping that anchor, is it not?

A. Until she straightens up on the chain, yes, and tows that anchor——

Q. By the time she straightens up with the chain she will be clear across the channel, will she not?

A. It depends on how far she has got to go.

Q. Whether or not you break a chain or lose an anchor depends on several things, does it not? It depends on whether the anchor tails hold or not, for one thing, does it not? A. Yes.

(Testimony of A. T. Lowery.)

Q. It depends on how fast the ship is going for another thing, does it not? A. It does.

Q. In other words, as long as your chain is paying out freely why you probably won't lose your anchor. Is that a fact?

A. Not necessarily, no. [792]

Q. I say you probably won't lose your anchor.

A. You probably wouldn't.

Q. As long as your chain is paying out freely. But sometime or other, if you are going to have any effect out of the anchor at all, you have got to fetch up on that chain, have you not?

A. Put a strain on it with the brake, yes, just like slowing an automobile.

Q. Yes. Now, when you put that strain on it with the brake, that is the time you may lose your anchor, is it not?

A. You may and you may not.

Q. And you do not dare put your strain on that brake until you have paid out considerable fathoms of chain, do you?

A. You usually start to check it, and in a case of an emergency, there, start to check when you get fifteen fathom out.

Q. Ninety feet? A. Ninety feet.

Q. And how much chain have you got out when you have finished checking it?

A. Usually try to hold thirty in the water.

Q. Who is it that requests this man be on the forecastle head on these ships? Is it the pilot, a Columbia River pilot?

(Testimony of A. T. Lowery.)

A. I usually request that myself.

Q. All the time the ship is in the Willamette River?

A. While proceeding downstream in the Willamette River, yes.

Q. Day or night? [793]

A. Just—yes, day or night, yes.

Q. When do you have them go on the forecastle head when you are coming up the river?

A. Usually have them going on the forecastle head coming up the river at Terminal 4.

Q. Why do you make that difference?

A. Because you are coming upstream and it is just more of a habit than anything else, I guess.

Q. There is no requirement of any kind except the opinion of your pilots—

A. That is all.

Q. —that has to put a man on the forecastle head, is it? A. That is all.

Mr. Wood: That is all, I think.

Mr. Young: That is all, I think.

(Witness excused.)

Mr. Young: That is the conclusion of our testimony, your Honor.

Mr. Wood: If your Honor please, I do not think that this matter of the anchors was properly made an issue in the case, either in the pleadings or in their case in chief, and I do not know how it has impressed your Honor, but if your Honor thinks it is

of any importance I think we ought to have the right to put on some expert testimony ourselves.

The Court: Well, I will leave that decision to you, Mr. Wood. [794]

Mr. Wood: Well, I will say I should like to put some on, but I have not got it right here in the court room. I do not think it was rebuttal in any sense.

Mr. Young: If the Court please, may I move to dismiss the witnesses who have been called this morning?

Do I understand that counsel wishes to put on further testimony?

The Court: That is correct. But he is not ready now.

When will you be ready?

Mr. Wood: I do not know, your Honor. I will have to go out and inquire.

The Court: Then we will adjourn Sine Die until I hear from you further.

Mr. Wood: If your Honor would like to, I am perfectly willing to go ahead with the arguments now and put that testimony on later.

The Court: Do you want to go ahead with the argument now, Mr. Young?

Mr. Young: Well, the only difficulty with it, your Honor, is that we may have to argue it again.

The Court: That would be my difficulty, principally.

Mr. Young: I think it would be very unsatisfactory.

The Court: Well, we will proceed with the argument. You might sit inside, or——

Mr. Young: If the Court please, before proceeding with the argument, in view of the question which has arisen between myself [795] and counsel about the state of the pleadings, I am going to ask leave to amend the original libel to conform to the testimony by adding to Article X two additional subdivisions which would be numbered Subdivisions 12 and 14. I am giving opposing counsel a copy of the proposed amendment and a copy to your Honor. Do you care to have me read the additions? They are short.

The Court: Just tell me what they are.

Mr. Young: Subdivision 12 is that it is an additional charge of negligence against the Pennsylvanian that no competent person was immediately available on the forecastle head of the SS. Pennsylvanian to drop the anchors of said vessel in response to command from her bridge; and 13, that no timely, or any, order was given by the officers of the SS. Pennsylvanian for the purpose of stopping or slowing said vessel and thus avoiding said collision.

The Court: Should I allow that amendment, you will have ample time to meet it.

Do you have objection to the amendment on that basis?

Mr. Wood: Well, I make the objection, but I know that your Honor has already overruled the objection because you have admitted the testimony.

The Court: The amendment is permitted.

Mr. Young: It may be understood, then, I take it, your Honor, that the proposed amendment may also be regarded as being [796] incorporated in the answer of Libelant to the cross libel in respect to Article I appearing on page 3 of the answer in the cross libel. Your Honor may recall that in view of the charges made against the Libelant we set up the affirmative defense of negligence on the part of the cross libelant and did so by reference.

The Court: The same ruling.

Mr. Wood: I should like it understood in the record that this allegation in the amendment is denied by us and that our pleadings may be deemed amended to deny it. The allegation I refer to is as follows: "12. No competent person was immediately available on the forecastle head of the SS. Pennsylvanian to drop the anchors of said vessel in response to command from her bridge."

The Court: It is so understood.

Mr. Young: No objection.

The Court: The decision of the Inspectors in this case is excluded. The Pennsylvanian's bell book is admitted, engine room bell book. Attention is called to Chapter 414 of Oregon Laws of 1914 enacted by the recent legislature entitled "Uniform"——

Mr. Young: Pardon me. That is the engineer's bell book your Honor is referring to.

We will withdraw the objection to that.

The Court: It is admitted before you withdraw it.

Mr. Young: I understand so. But the state of the record will show. [797]

The Court: The record will show that, of course. Attention is called to Oregon Laws 414, Oregon Laws 1941, enacted by the recent legislature, entitled "The Uniform Business Records Act," which, I feel has some bearing by analogy.

Mr. Wood's offer of the pilot's statement to the Inspectors I do not recall whether I ruled on or not. It is admitted, subject to the objection. Attention as to that is called to Volume 4 of Wigmore, Section 1122 and following, Third Edition.

What happened to the two logs of the ships? Were they by mutual agreement not offered in the case? The Pennsylvanian—or did the Barry K have a log?

Mr. Young: Yes, and I offered the use of it to opposing counsel.

Mr. Wood: The Barry K had a very meager log. Our log has been available all through the trial and is still available.

The Court: Neither side is offering either log, then.

Mr. Young: That is right.

Mr. Wood: That is correct.

The Court: Shall we take five minutes before we make argument?

Mr. Wood: May I have an exception to your Honor's ruling excluding the decision of the Inspectors?

The Court: Yes, sir.

Mr. Wood: As I understand, you are excluding the decision of the Inspectors in Captain Reed's case. That is the one you are excluding. [798]

The Court: That is the one I mean.

Mr. Wood: What was your ruling on the other one?

The Court: The other one was admitted subject to the objection made by Mr. Young. It is in the record also, as the pilot's statement to the Inspector is in the record, admitted subject to the objection. I may say, because you gentlemen practice admiralty so largely, that I discussed this matter rather fully with Judge Fee before coming to the conclusion that I have in excluding the decision in this case of the Inspectors.

Mr. Wood: One further word about these amendments. Of course, I do not know where they come in the pleadings, but I assume that he alleges we were negligent in not giving any order to drop the anchors, and if that is the allegation, that must be deemed denied on our part.

The Court: Yes.

Mr. Young: I so understand. They follow as additional subdivisions to Article X of the original libel.

The Court: Five minutes.

(Thereupon, following a recess, the matter was argued the remainder of July 23, and July 24, subsequent to which, Court was adjourned until Friday, July 25, 1941, 10:30 A. M.) [799]

Friday, July 25, 1941, at 10:30 o'clock A. M., the following further proceedings were had:

HENRY C. DYER,

recalled as a witness in sur-rebuttal in behalf of the Respondents, having been previously sworn, testified further as follows:

Direct Examination

Mr. Wood: I think your Honor will remember this man's experience as a port captain of the States Steamship Company, Pacific-Atlantic Steamship Company, and Master of steam vessels coming into this river for a number of years past, including the passenger ship General——

Q. What was your passenger ship?

A. Sherman, General Sherman.

Q. Captain Dyer, what is the practice and has been the practice all during your time of keeping the carpenter and the Chief Mate on the forecastle head of a steamer leaving this port bound down the river?

A. Down through the bridges, down under St. Johns Bridge. After that leave the forecastle head and leave a man on lookout.

Q. Is there any practice or has there been any practice of keeping them on the forecastle head until the vessel reached the mouth of the Willamette River?

A. No, sir, not on any ship I have been on.

Q. Would you regard it as good seamanship when vessels are approach- [800] ing each other in

(Testimony of Henry C. Dyer.)

the nighttime in Post Office Bar channel and they are within 800 or a thousand feet of each other, say, or even twelve or fifteen hundred feet, and the danger signal is blown and the ships are approaching each other from some angle, to let go an anchor on the part of the steamship?

A. No, sir, I wouldn't. I would think it a very foolish maneuver under most circumstances, as when you drop your anchor you lose the maneuvering power of your engines principally and especially if you have way on her, the danger of losing the anchor altogether or having the anchor pay out to such an extent that you just swing helplessly at the end of the chain; dropping an anchor in close waters, if you have got any way on her, is usually a matter of desperation. When going ashore you drop your anchor, even at the risk of running your chain out, to have that anchor in deep water to assist you in backing off, in getting out. But in the matter of a collision, I can't think of an occasion where the maneuvering power of your engines wouldn't be superior to what checking power you got out of your anchors, especially with the risk of its taking charge and just running out or carrying away.

Q. What do you mean by "taking charge"?

A. I mean with the brakes not being able to control it.

Q. Is there any danger to the man on the fore-castle head letting go an anchor going at six or seven knots?

(Testimony of Henry C. Dyer.)

A. Yes, I think there would be a very definite danger, if the chain [801] should snap and pieces fly out or pieces of the chain pipe chipped out by the flying chain. I have known that to happen.

Q. You wouldn't regard it then as a practicable operation? A. No, sir.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. Captain Dyer, how recently have you personally piloted any ocean-going ships down throught the Willamette River?

A. Well, I never—you mean how recently have I been in command of a ship going down? Well, I can't give you the exact date; within the last two years, I should say.

Q. Within the last two years?

A. Yes. In moving a ship from Portland to Vancouver, relieving a Master temporarily for that move, something of that sort.

Q. Then within the last two years you have not had very much opportunity to know what the custom is with regard to who remains on the fore-castle head until the ship reaches the Columbia River; is that right?

A. Well, I think that I would be aware of any such standard practice on our particular ships because it would show up in the overtime.

Q. You are talking about your own ships now?

A. Yes, I am.

(Testimony of Henry C. Dyer.)

Q. You can't speak for ships of any other lines, though, in that regard, can you? [802]

A. No, I have no positive knowledge. I just speak from the vessels of our own line and ships that I have been on.

Q. Then in testifying as to the custom for the carpenter or the Mate or whoever is in charge of the anchors, to leave the forecastle head when the ocean-going boat gets down through the bridges, you are speaking only for your own company?

A. For States Steamship and Pacific-Atlantic, yes, sir.

Q. I see. Who it is that would determine what men should be on the forecastle head at any particular time on a vessel?

A. Well, the Master would.

Q. If the Master wanted to keep the carpenter or the Mate on the forecastle head in the event of an emergency, he would be at liberty to do so, wouldn't he?

A. Oh, yes.

Q. In other words, that is a matter discretionary with the Master; is that right?

A. All matters of maneuvering and so forth are discretionary with the Master. Outside of the laws, there are no set rules by the company.

Q. Now, if the pilot himself wanted to have someone on the forecastle head for emergency purposes until the boat reached the Columbia River or even farther, he would be at liberty to make that request, wouldn't he?

A. Make that request, yes. Then if the Master

(Testimony of Henry C. Dyer.)

considered the pilot's request reasonable, I am sure he would grant it. [803]

Q. Then there may be some difference among the various pilots in their practices in that regard; would that be true?

A. I don't quite understand.

Q. There may be some difference in the manner in which any particular pilot operates the vessel with regard to his desire that there be someone on the forecastle head? A. Oh, yes.

Q. Isn't it a fact, Captain Dyer, that if a vessel is in motion and the anchor is dropped, that dropping the anchor will tend to retard the forward movement of the vessel?

A. Yes, but it will also tend to—it doesn't directly check; it stops the direction in which you are going. Supposing a vessel is going along and you manage to drop fifteen fathoms of chain, you might, by keeping going ahead, steer her, but if the anchor takes aholt, then she will sheer one way or another; you lose your maneuvering power.

Q. But so far as the forward motion of the vessel is concerned, it will slow it up, won't it?

A. Yes, undoubtedly.

Q. If you, in your judgment, felt that it was advisable to drop an anchor in an emergency, you wouldn't worry too much about the danger of possibly losing that anchor, would you Captain?

A. Oh, yes, you have to figure that. You might run into a position where your anchor would be

(Testimony of Henry C. Dyer.)

still more necessary. You will hold your anchor to try to get the way off the vessel. [804]

Q. Well, the value of the anchor compared with damage that might arise from the collision would be very slight, wouldn't it?

A. Well, yes, if you felt that you were going to get any direct advantage from dropping your anchor, why—to avoid collision, that would definitely be the thing to do.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. When you speak of not wanting to lose your anchor you are not thinking of the value of it but the fact that to get any value out of the anchor you have to keep ahold of it?

Mr. Young: That is objected to.

The Court: You may answer.

Mr. Wood: Q. Is that what you mean, Captain? A. Yes.

Q. To get any value out of your anchor you have to keep it on the end of the chain, don't you?

A. Once your anchor is lost, it is of no value to you.

Q. How many ships, until you sold some recently, did the combined fleet of the States Steamship Company and the Pacific-Atlantic Steamship Company and California-Eastern lines have?

A. When I first came ashore four years ago, they had twenty-four.

(Testimony of Henry C. Dyer.)

Q. And they were all under your supervision?

A. Yes.

Q. And the matter of pilots on the Columbia River as employed on [805] your ships was all under your supervision? A. Yes.

Q. And when you were yourself a Master of a ship coming in and out of this river, did you employ Columbia River Association pilots?

A. Yes.

Q. Did you ever have any of them request you to keep a Chief Officer or carpenter on the fore-castle head after you got through the bridges?

A. Not that I recall.

Mr. Wood: That is all.

Mr. Young: That is all.

(Witness excused.)

EDWARD HARRY WOOD,

produced as a witness in sur-rebuttal in behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Wood, you were formerly a steamship Master employed by the States Steamship Company, weren't you? A. Yes, sir.

Q. For how many years were you a ship Master for that company?

A. Well, approximately four years.

(Testimony of Edward Harry Wood.)

Q. And before that were you Chief Officer?

[806]

A. Chief Officer, yes, sir, for at least ten years.

Q. For the States Steamship Company?

A. States and the old——

Q. Columbia-Pacific?

A. Columbia-Pacific, yes, sir.

Q. Then for ten years as Chief Officer and four years, did you say, as Master?

A. Yes, practically four years.

Q. Fourteen years you were coming in and out of this river on steamships for those companies, were you? A. Yes, sir.

Q. And when did you leave their employ?

A. In March, 1937, in the early part of March.

Q. And after you left them, whom were you employed by?

A. The American-Hawaiian Steamship Company.

Q. In what capacity?

A. The relieving officer.

Q. What does "relieving officer" mean?

A. Well, the new agreement, as they call it, called for a relieving officer at night to relieve the regular ship's officers while the ship was in port.

Q. In other words, as relieving officer, would you take the place of chief mate or Master, something like that?

A. No, I would take the place of possibly the chief officer but never the Master. [807]

(Testimony of Edward Harry Wood.)

Q. And as relieving officer would you go down the river with a ship? A. Yes, sir.

Q. How long did you act in that capacity?

A. From March, 1937, until March, 1940.

Q. About three years?

A. Just practically three years, yes, sir.

Q. Then you had a total experience on the Willamette and Columbia rivers either as chief officer or Master of about seventeen years?

A. Approximately that, yes, sir.

Q. Do you hold a Columbia River and Willamette River pilot's license? A. Yes, sir.

Q. Whom are you employed by now?

A. Willamette Iron & Steel.

Q. In what capacity?

A. As rigger foreman.

Q. In doing what ship work?

A. In the conversion work of any new navy transports or the navy transports.

Q. You have supervision of their rigging?

A. Yes, on their ship.

Q. Now, what is the practice and what has always been the practice from your experience about keeping the chief officer and the [808] carpenter on the forecastle head of vessels leaving this port bound for sea?

A. Whenever you would be going down the river, why it has been customary to always take them off when they got through the bridge, the St. Johns bridge.

(Testimony of Edward Harry Wood.)

Q. In your experience as Master for the States Steamship Company, did that company employ Columbia River pilots while you were acting as Master?

A. Yes, sir.

Q. Columbia River Association pilots?

A. Yes, sir.

Q. Did you ever hear any of them request you as Master to keep a Chief Officer or carpenter on the forecastle head after they got through the bridges?

A. No, sir.

Q. Have you, acting as Chief Officer for the American-Hawaiian Steamship Company, as relief officer,—have you ever been asked or ordered to stay on the forecastle head after you got through the bridges?

A. No, sir. Unless there would be a possibility of it being a little hazy.

Q. Thick weather, I know, but I am assuming a clear night.

A. No, sir, I never was.

Q. What would you say as to the advisability of letting go an anchor when you were close in the jaws of an approaching [809] collision?

A. Well, it would depend on the speed and there would be a lot of circumstances where it would get you into serious difficulties, because once that anchor gets down you haven't got the maneuverability of your vessel; she is bound to swing and possibly do more damage.

Mr. Wood: That is all. You may cross examine.

(Testimony of Edward Harry Wood.)

Cross Examination

By Mr. Young:

Q. Captain Wood, why has it been the practice for the American-Hawaiian ships to have the carpenter or the Chief Mate on the forecastle head while going through the harbor in Portland?

A. Oh, there is always a possibility that she could take a sheer or something.

Q. And if she did take a sheer, what would the carpenter or the Chief Mate up on the forecastle head do about it?

A. Well, lots of times we would be going up through the bridge and you would whistle for the bridge and the bridge would give you the danger signal or wouldn't answer your signal with an open signal.

Q. Well, do I understand, then, if some emergency arose when you were in the harbor at Portland, you have the Chief Mate or the carpenter on the forecastle head to drop the anchor, if necessary?

A. Yes, if they couldn't open the bridges you certainly would [S10] have to anchor it.

Q. Well, suppose that there were some imminence of a collision with another ship, apart from the matter of the bridges themselves, might you in the harbor want to drop the anchor to avoid such a collision?

A. That would be up to the Master and the pilot on the bridge; that would be up to their discretion.

Q. Well, you can conceive of circumstances

(Testimony of Edward Harry Wood.)

where they might find it advisable to drop the anchor to avoid a collision, can't you?

A. I didn't just understand that.

Q. Can't you conceive of circumstances where the Master or the pilot on the ship might wish to have the anchor dropped in order to avoid a collision with another ship?

A. Yes, possibly if the ship was backing away from a dock or something like that or if he was out of control.

Q. Ships can get out of control in the lower Willamette as well as in the harbor in Portland, can't they? A. Yes, sir.

Q. And as a matter of fact, it is possible to have collisions down between St. Johns bridge and the mouth of the Willamette, just as well as it is up in the harbor; isn't that true? A. Yes, sir.

Q. When you take the carpenter or the Chief Mate off the forecastle head after getting out of the Portland harbor, you simply take your chances from that time on with regard to the matter [811] of dropping an anchor, don't you?

A. Yes, in a way.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. In approaching a bridge, when a steamship approaches any bridge, it is at very slow speed, is it not?

A. Yes, sir, barely steerageway.

Q. Barely steerageway? A. Yes, sir.

Mr. Wood: That is what I thought. That is all.
(Witness excused.) [812]

JOHN NORBERG,

was recalled as a witness in behalf of the Respondents, in sur-rebuttal, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Captain Norberg, to refresh all our memories, how long has your experience coming in and out of the Willamette and Columbia rivers covered——

Mr. Young: Pardon me, if the Court please; I don't want to be technical about this matter but you must remember that the evidence in this case was all closed except the opportunity given to opposing counsel to put on witnesses who were not available during the trial with respect to this matter of the anchor. Now, Captain Norberg has been here during the entire trial. Of course, it is a matter for your Honor's discretion, but it occurs to me that since the case has been concluded it is rather out of order to call a witness now who was actually here during all of the trial.

The Court: Well, he is putting on all of the anchor testimony at once. He may testify.

Mr. Wood: It was my understanding that we would put all of the anchor testimony in at this time regardless of who the witnesses were.

Q. What is the length of your total experience

(Testimony of John Norberg.)

as Master or pilot in these Willamette and Columbia rivers? [813]

A. Thirty-six, thirty-seven years.

Q. And you have already testified that part of that time you were Master, part of that time you were a pilot for the Luckenbach Steamship Company and now a pilot for the American-Hawaiian steamships?

A. Yes.

Q. Now, all that time what custom or practice has existed about keeping the Master or the carpenter on the forecastle head of the steamship—I mean the Chief Officer and the carpenter on the forecastle head of a steamer leaving Portland and bound for sea?

Mr. Young: That is objected to because the witness has already testified upon this point, your Honor.

The Court: He may answer.

Mr. Wood: Q. What has been the practice?

A. To call the Chief Mate and carpenter off the forecastle head after passing through the bridges.

Q. Has there ever been any practice to keep them on the forecastle head in clear weather till the ship got to the mouth of the Willamette River?

A. No.

Mr. Wood: This witness has, your Honor, it is true testified that he thought it was unnecessary and useless to drop the anchors in such close quarters as they then were, but I will not go into it, but I am not shying away from it. [814]

The Court: I remember his testimony.

(Testimony of John Norberg.)

Mr. Wood: If counsel wants to ask him about that, I invite him to.

The Court: Cross examine, Mr. Young.

Cross Examination

By Mr. Young:

Q. Captain Norberg, you have testified that it is not the practice to have either the Chief Mate or the carpenter on the forecastle head as soon as you pass the bridges. But suppose that you are traveling in thick weather, does that make any difference in your practice?

A. Oh, in thick weather, yes.

Q. That is to say, in thick weather you would keep the carpenter or the Chief Mate on the fore-castle head, wouldn't you?

A. Yes.

Q. And why?

A. Because you can't see far enough ahead.

Q. Well, what could the Chief Mate or the carpenter do about it?

A. If he got too close to shore on either side, he could call for the Chief Mate to let go the anchor and he would be assistant to the man in the lookout to warn us in thick weather, when the visibility is poor.

Q. Why would you want to throw out the anchor if you were too close to the shore?

A. Well, that is natural, if you can't sheer off?

[815]

Q. In other words, you put out the anchor if you are running close to shore in order to avoid running into the shore; isn't that it?

(Testimony of John Norberg.)

A. When we can't see far enough, we always drop the anchor. It doesn't make any difference if we are close to shore, in the middle of the river, or any place.

Q. Suppose you are in the fog——

(The last answer was read by the reporter for Mr. Wood.)

Mr. Young: Q. Well, suppose that in the fog a ship suddenly looms up ahead of you, when you are traveling four or five knots an hour, under those circumstances might you want to drop the anchor?

A. It might be such circumstances. It may.

Q. Yes. And the reason why you would do it then would be to retard the headway of the ship, wouldn't it?

A. At that time, when it is that thick we just go at a snail's rate; we don't go fast.

Q. What do you mean by a snail's rate?

A. Go one or two knots an hour, perhaps.

Q. If you are going one or two knots an hour and a ship loomed up ahead of you in the fog and you put out your anchor you probably wouldn't hit her, would you?

A. Well, if she goes that slow, yes, and after you stop close, too, you see about a hundred feet or two hundred feet, you know, that is a different thing.

[816]

Q. Well, if you are traveling, say one or two knots an hour and you saw a ship suddenly loom up ahead of you in the fog, by dropping your anchor

(Testimony of John Norberg.)

you might very well avoid a collision, mightn't you?

A. We may and we may not.

Q. Suppose there isn't any fog and the course of a ship ahead of you is such that you become aware there is a possibility of collision, by dropping your anchor you might then avoid a collision, too, mightn't you?

A. No, I may not. I might make a worse mess out of it than if I run without the anchor.

Q. It would depend upon the circumstances at the time, wouldn't it?

A. It depends on the circumstances at the time being.

Q. The purpose of dropping an anchor when a ship is moving is to stop the ship, isn't it?

A. Not always.

Q. Isn't that one of the reasons for dropping the anchor?

A. If you have got space enough ahead of you; if you haven't, the anchor is no earthly good to you.

Q. Assuming that you have some space ahead of you, you would hope by dropping the anchor to retard the forward movement of the ship, wouldn't you?

A. Well, if we had plenty of space ahead of us, then it might be all right, you know, if we had plenty of space ahead of us [817] and had the way off the ship, take it off, take the speed off; that is sailors' language.

Mr. Wood: Q. You said if you had the way off the ship; is that what you said?

(Testimony of John Norberg.)

A. Yes, the way off her.

Q. In other words, if you had no headway?

A. No headway.

Mr. Young: Q. Captain, just one or two more questions and I am through. If the ship is proceeding forward and you drop the starboard anchor, what is the tendency then with regard to the direction of the ship after that?

A. Just when she takes the weight on the anchor, you know; if you drop the anchor she wouldn't start to swing any place before she takes the heavy weight on the anchor. And then the starboard anchor, she will tend to swing off to the right.

Q. And a port anchor, she will tend to swing off to port?

A. Yes, after she got the weight on the anchor, but not before.

Q. I understand, but the river is comparatively shallow at this point, isn't it? A. No.

Q. Even in the channel there is only thirty-five feet of water, isn't there?

A. That is plenty of water.

Q. How long is your anchor chain?

A. About 120 fathoms. [818]

Q. And six feet to a fathom? A. Yes.

Mr. Young: That is all.

Redirect Examination

By Mr. Wood:

Q. You said if you dropped an anchor in case of an approaching collision, you would be very apt to make a mess of it; that was your phrase?

(Testimony of John Norberg.)

A. Yes.

Q. What do you think would have happened on this night if you had dropped the anchor?

A. I would have run right into the Barry "K", I believe.

Q. Counsel asked you whether in thick weather it was the practice to keep the Chief Officer and the carpenter on the forecastle head.

Mr. Young: If I said both, I didn't mean that; one or the other.

Mr. Wood: It is not the practice to keep the Chief Officer and the carpenter and the lookout all on the forecastle head, is it? A. No; just one.

Q. The Chief Officer or the carpenter, not both?

A. Yes.

Q. That is what you mean? A. Yes. [819]

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [820]

L. O. HOSFORD,

recalled as a witness in sur-rebuttal by the Respondents, having been previously sworn, testified as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hosford, you also have stated your experience. What do you say as to whether there is any practice to keep the Chief Officer and the car-

(Testimony of L. O. Hosford.)

penter or either of them on the vessel's forecastle head on a night when visibility is good, going downstream out of Portland after you get below the bridges? What is the practice?

A. Well, in my nine years of experience as pilot and two or three years as mate on ocean-going vessels, it has never been the practice to my knowledge of keeping the mate on the forecastle head after the ship is clear of the bridges, the St. Johns Bridge.

Q. What is the difference in the circumstances or conditions that makes it a practice to keep the chief officer or the carpenter on the forecastle head moving about the harbor to the bridges and not keeping him there after you get below the bridges?

A. Well, in maneuvering a ship in the harbor through the various bridges, there is always a great possibility of the bridges failing to open. The ship is handled or maneuvered at a very slow speed whereby we always figure that possibility of the bridges not being able to open and we can stop the ship with her engines in the event that anything might happen with the engines, with the slow [821] speed of the ship, we could stop her headway with the anchors and avoid hitting the bridges. It is just merely a matter of extra precaution due to the fact that the bridges quite frequently are unable to open and we always have the ships running at a very slow speed where they are under control at all times in those narrow quarters.

Q. Were you in the court room here when Cap-

(Testimony of L. O. Hosford.)

tain or Pilot Lowery testified that he had some experience in letting go an anchor on a steamship at seven knots? A. Yes, sir.

Q. What would be your comment on that?

A. I think it is ridiculous. I don't think it is possible to let go an anchor and hold the anchor of a vessel going seven knots. I don't think in the first place that the compressor would—you would be able to hold the anchor and if you did hold it, it would either carry away the chain or more likely tear something loose, tear the windlass loose from the deck, kill the men on the forecastle head. I don't think it is practical, or I don't think it has ever been done. At least it is not safe and practical. I have never seen it done in my experience.

Q. Do you think that it would have done any good for the *Pennsylvanian* to have dropped an anchor when she and the *Barry K* were approaching so close in Post Office Bar the danger of collision would become obvious?

A. No, sir; I do not think so. I think it would have been very [822] poor judgment.

Q. Why ?

A. In the first place, the two ships at that time were too close together, for even had they got the anchor down and had been able to hold it, to have done any good, and had the anchor held, any good as far as checking the way on the ship, you would have lost the maneuverability of the ship, and she would have been helpless as far as helping herself

(Testimony of L. O. Hosford.)

to maneuver and I don't think that the anchor would have taken hold in the short space of time had they been able to get it out in time to do any good as far as even checking the way of the ship or avoiding the collision.

Mr. Wood: You may cross examine.

Cross Examination

By Mr. Young:

Q. Captain Hosford, you were not on board the *Pennsylvanian*, of course, the night of the accident, were you? A. No, sir.

Q. You have not any personal knowledge of the particular problems that were then involved, have you? A. No, sir.

Q. When you state that it was ridiculous for an anchor to be dropped on a boat going seven knots an hour, do I understand you to say that Captain Lowery in fact did not drop the anchor, or that he was unwise to do it? Which did you mean?

A. I would say he was very unwise to attempt to do it. [823]

Q. You are not attempting to say to the court that in point of fact Captain Lowery did not drop the anchor?

A. No, I wouldn't say that, certainly not.

Q. Now, what speed do the ocean-going ships in the harbor ordinarily travel?

A. Just barely have sternway, which probably may be a knot an hour, not to exceed a knot, or a knot and a half an hour.

(Testimony of L. O. Hosford.)

Q. And when a vessel in the harbor is travelling at a knot or a knot and a half an hour, going at such a slow speed as that, when you throw the engines full speed astern, the effect is rather rapid, is it not, in stopping the ship?

A. On most ships, yes. Some ships vary in manœuvering power, in backing power. That has a lot to do with the ship, and the construction and the type.

Q. In other words, in the harbor, where the ships are travelling at such a slow rate of speed, you have even less need for the anchor than you would have down the river farther where the ships are travelling faster. Is not that true?

A. Well, we never—it has been my policy, and I think the policy of all pilots, to govern the speed of his vessel with relation to the surrounding conditions. After you get clear of the harbor with no bridges and narrow confined spaces, why we consider the channel clear and safe and can let the ship go.

Q. Now, you have used the term “extra precaution” in reference to the matter of having either the carpenter or the mate stationed [824] on the forecastle head to operate the anchors when you are in the harbor. As I understand your testimony, then, this extra precaution is used in the harbor but the extra precaution is not used anywhere else in the river.

A. I wouldn't say that, Mr. Wood. We use every precaution possible.

(Testimony of L. O. Hosford.)

Q. I mean the extra precaution about having someone on the forecastle head to drop the anchor upon order.

A. Yes. Wherever we consider the necessity or the possibility of needing an anchor or in thick weather or conditions like that, why the mate or the carpenter is as a rule on the forecastle head.

Q. Well, where else on the Willamette or Columbia rivers than in the Portland harbor do you regard it as advisable to have someone on the forecastle head to drop the anchor? A. No place.

Q. No place? A. No, sir.

Q. Then what did you mean a few minutes ago when you said that whenever you regard it as advisable you would have someone there?

A. In thick weather, or if we anticipate fog, where we have to bring the vessel to a stop quick and anchor her.

Mr. Young: That is all.

Mr. Wood: That is all, Captain.

(Witness excused.) [825]

JAMES A. HAZELWOOD,

recalled as a witness in sur-rebuttal in behalf of the Respondents, having been previously sworn, testified further as follows:

Direct Examination

By Mr. Wood:

Q. Captain Hazelwood, I have forgotten how

(Testimony of James A. Hazelwood.)

long you have said you have been coming into these rivers as Master of steamships.

A. Yes, sir; since 1926. Before that I was mate.

Q. And how long a time did your experience as mate and Master cover?

A. From '22 until October, '35.

Q. And since '35 have you been familiar with the practices on your own American-Hawaiian ships?

A. I have been up and down the river on several of the ships; yes, sir.

Q. Now, during your experience as chief officer and later Master, what can you say as to this alleged practice of keeping the chief officer and carpenter on the forecastle head of a vessel going downstream?

A. To my knowledge we have never kept the chief officer or anyone on the forecastle head except the lookout after the ship gets through the bridges unless it was foggy weather or hazy.

Q. You have confined your answer to your ships. Did you ever hear of any practice to keep them on, on any other ships?

A. No, sir; I have not, and those things are usually judged by [826] the Master of the ship and all of my experience has been here on the river with the Columbia River pilots, members of the Association, and I have never had a request from one of them to keep a man on the forecastle head other than the lookout at night after the ship got through the bridges.

(Testimony of James A. Hazelwood.)

Q. There has been some testimony just given about dropping an anchor here in the harbor. Have you any comment to make on that?

A. Well, there certainly are occasions that an anchor may be dropped in the harbor. Sometimes when there is a current in the river the anchor is used to turn the ship on. The pilot can say "Hold it at fifteen," or "Hold it at thirty," and you can do it.

Q. Suppose a ship is approaching the bridge, a steamship, and the bridge does not open in time. What is done?

A. In my experience, an anchor is never let go to stop the ship in those instances. You can stop the ship. The anchor is let down to help keep the ship in the middle of the channel. If you put your anchor down, you can keep your engines slow and you can keep your ship heading toward the draw of the bridge.

Q. In other words, the anchor is used to keep the position of the ship rather than to stop the ship?

A. Certainly; in those instances and in a fog. The attorney asked a question about an anchor in the fog. You just don't see a ship in the fog. You hear the ship blowing a whistle and he blows a whistle and you answer him with one. When you get up to that ship you are stopped, and it is one of the things that makes [827] a man very mad, if he sees a ship in the fog, and if he sees it, some fellow lets go an anchor in front of him. That is more danger

(Testimony of James A. Hazelwood.)

of causing a collision in that instance than anything, because the ships are going so slow when they see one another that they can maneuver around. I have left Portland here and never see anything until we got to Longview in the fog, and we met ships all along.

Q. What harm would it have done to anchor then?

A. Well, if the fellow that let go his anchor, the other fellow may have had a little way on, and when a man drops an anchor he has got no control over his ship any more. He is finished with the ship. When he backs or goes ahead his ship yaws around on the anchor.

Q. What is your opinion as to whether it would have been a proper maneuver for the Pennsylvanian to drop an anchor in this case?

A. In that close quarters, Mr. Wood, going five miles an hour, I can't even think that any man on the forecastle head could have opened that compressor and put it on enough to get that anchor to hold any in the length of time that those two ships came together after it was no question but what there was going to be a collision. In fact, if he had let go of the anchor, when he let it go, he may have let it go on board of the barge or on the Barry K.

Q. What is that?

A. I say when they once sing out to let go the anchor and the [828] man starts to open the com-

(Testimony of James A. Hazelwood.)

pressor, it is almost impossible to withdraw that order.

Q. The order?

A. After the maneuver is once started of opening up that compressor——

Q. Yes.

A. ——the anchor goes. They were so close together at that time, if the anchor did go it may have gone aboard the barge or aboard the Barry K, because that is the place where the Pennsylvanian struck.

Q. Has that ever happened in that case?

A. I was in Buenos Aires, Argentine, when the American Legion let go her anchor and sunk two navy tugs, and this was to prevent the ship from hitting the dock at the time. That is a matter of record.

Mr. Wood: I think that is all.

Cross Examination

By Mr. Young:

Q. On this question as to whether there was any danger of the Pennsylvanian dropping her anchors on the barges of the Barry K, it would, of course, depend upon the point of time at which the order to drop the anchors was given and when it was carried into execution, would it not?

A. That is a fact, but from the testimony that I have heard here of the distance apart that these ships were at the time that it was imminent that a collision was going to be, this man was in [829]

(Testimony of James A. Hazelwood.)

the eyes of the ship, right up in the forecastle head.

Mr. Wood: What man do you mean?

A. Sir?

Mr. Wood: You say this man was up in the eyes of the ship.

A. The lookout man. And if there had been an order given to drop the anchor, by the time he stumbled over what he had to do to get back and go behind the windlass, which he would be looking forward then and get over to the wheel of the compressor and turn it, it would be a matter of thirty seconds, anyway, before he could do this.

Mr. Young: Q. You are talking about the lookout now, are you not? A. Yes.

Q. The lookout is not the man that you ordinarily expect to drop the anchors, is he?

A. I have seen many men on lookout drop anchors in my time. That is not a complicated job that takes any man of experience to do. Any man that can turn a wheel can let go an anchor.

Q. If that is true, why did you not leave the matter of handling the anchors up to the lookout when the steamer *Pennsylvanian* was in the Portland harbor instead of having either the mate or the carpenter there?

A. In Portland harbor, the mate of the ship is kept on the forecastle head as an extra lookout. You are around where you have got lights on both sides of you. You have got small boats with [830] tows, you have got ships backing out of docks, many

(Testimony of James A. Hazelwood.)

things that happen in harbors that do not happen after you get out of the harbor limits, and therefore the chief officer is there as an extra lookout to assist in the navigation of the ship.

Q. Well, if the chief officer or the carpenter had been on the forecastle head at the time of this Pennsylvanian accident, then this time loss of thirty seconds that you refer to would not have been involved at all, would it?

A. No, that wouldn't have been involved. I don't think that was the question either. The question is that it has not been the practice of keeping anyone other than the lookout on the forecastle head except in the thick weather after the ship leaves the harbor limits or passes through the bridge.

Q. You used the phraseology that these things are usually judged by the Master of the ship. What were you referring to when you said that?

A. I mean to say that at the time the lookout—the mate and the carpenter shall leave the forecastle head.

Mr. Wood: You said "lookout." You took that back, did you not? The lookout——

A. I mean the carpenter and chief officer.

Mr. Young: Q. In other words, the decision on the precise time when the carpenter or the mate leaves the forecastle head is up to the Master of the ship, is it not? A. That is right. [831]

Q. And if the Master of the ship thinks it is advisable to keep that individual on the forecastle

(Testimony of James A. Hazelwood.)

head after you get through the bridges and on down to the mouth of the Willamette River or below, he can do so, can he not?

A. Naturally keep him right on there.

Q. All the way down to the mouth of the Columbia?

A. Yes, sir; down to 150 miles from Portland.

Mr. Young: That is all.

Mr. Wood: That is all.

That is everything.

The Court: Are either of you going to use the exhibits in this case within the next week?

Mr. Young: I am not personally, your Honor. I am leaving the city tomorrow morning.

(Witness excused.) [832]

[Title of District Court and Cause.]

Thursday, July 24, 1941, at 3:20 o'clock P. M., at Suite 1310, Yeon Building, Portland, Oregon, there being present Mr. Clarence J. Young, of Proctors for the Libelant, and Mr. Erskine Wood, of Proctors for Respondents, the testimony of Earle B. Vaux was taken in the above entitled cause, pursuant [833] to the stipulation entered into between Proctors present in behalf of the respective parties, as follows:

Mr. Wood: Stipulated that the following testimony of Captain Vaux may be read in evidence at the trial on the question of damages the same as if he were present and testifying in person, subject to such objections as there may be made.

Mr. Young: That is satisfactory.

Mr. Wood: He has already been sworn. He does not have to be sworn again.

Mr. Young: That is right.

EARLE B. VAUX

was thereupon produced as a witness in behalf of Respondents, and, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Now, Captain Vaux, after the collision did you examine the damage that had been done to your ship by the collision? A. Yes, sir.

Q. I want you to state in a general way what that damage was.

A. The damage that I saw and remember and also put in a report to the Company's offices at San Francisco the following day [834] consisted of four damaged plates which were at that time believed had to be renewed.

Q. And any frames?

A. There was damage to frames, being out of line.

Q. Where were these plates and frames?

A. I cannot remember just the exact position without referring to my own letter to the Company.

Q. You do not have that now?

A. I have not got it with me, no. It is on file in my office.

(Testimony of Earle B. Vaux.)

Q. I did not mean to have you state exactly what they were.

A. I know it was G. and H. strakes, two on each side.

Q. The damage was forward about the bow, was it?

A. Yes, sir.

Q. You did not prepare the specifications for the repairs or anything like that?

A. No, that is not my duty.

Q. Do you know that there were four plates that have to be renewed?

A. I did know there were four plates that will have to be renewed.

Q. And was there not another plate that had to be faired in place?

A. Faired in place; yes, sir; but not renewed.

Q. Does your vessel have to go on dry dock?

A. It was necessary to dry dock the Pennsylvanian.

Q. As a result of the collision?

A. As a result of the collision, due to the fact there were open holes in the vessel, punctured plates. [835]

Q. Was that dry dock in Portland?

A. It was the Portland dry dock in Portland.

Mr. Wood: That is all.

Cross Examination

By Mr. Young:

Q. When was it that you made your inspection?

A. Directly when the vessel returned to the dock in Portland after the collision.

(Testimony of Earle B. Vaux.)

Q. That would be on February 1, 1941?

A. That would be on February 1, 1941, at about 5 A.M. in the morning when I went into the tanks—that is, the 4-B tank.

Q. The vessel was, of course, in the water at that time? A. Yes, she was.

Q. Did anyone accompany you when you made your inspection?

A. Yes, there were, sir, two others. A Mr. Sholts—I don't recall how he spells his name. He is of the Willamette Iron & Steel. And the assistant to Mr. Sholts at the time. Incidentally, the way into that tank is through a manhole, and it requires someone with not too broad a beam to get down through that manhole.

Q. You referred to G and H strakes as being damaged. A. Yes.

Q. How are those strakes lettered? Where does "A" begin?

A. Number A is the first strake, and then you come right straight down—A, B, C, D, E, F, G, and so forth.

Q. Were G and H strakes above, or below, the water line? [836]

A. Just about at the water line, at that particular time.

Q. That is as the boat lay in the water at that time?

A. When she was not underway those holes in G and H strakes were above water, but as the

(Testimony of Earle B. Vaux.)

vessel was underway and making headway she has what is known as a bone in her teeth—it pushes the water up and would allow the water to come in in those holes.

Q. At the time that she was placed on dry dock, did she have cargo in her?

A. Yes, sir; she did.

Q. How much?

A. I don't recall the figures, Mr. Young. That is figures we can readily obtain.

Q. What tonnage of cargo would she carry when loaded to capacity?

A. When loaded to capacity?

Q. Yes.

A. She would carry better than nine thousand tons.

Mr. Wood: Does this relate to the damages?

Mr. Young: Well, it perhaps does in another aspect of it. I was interested, however, in the amount of cargo that might be on board at the time of the accident, and this was a question simply related to that. I am not pressing the point, however, further.

Q. Except for the letter that you mentioned as having written to your office, you have no memorandum of what the damage was?

A. No accurate memorandum as to actual and correct figures of [837] damage; no, sir.

Mr. Young: That is all.

(Testimony of Earle B. Vaux.)

Redirect Examination

By Mr. Wood:

Q. In fact, you are not attempting, necessarily, to state now all of the damage; you are simply stating what part of the damage you saw?

A. That I can remember at this time, yes, sir, without referring to the letter that I spoke of that is on file on board the vessel and in the Company's office in San Francisco.

Q. Furthermore, it frequently develops after a collision that some damage exists which has escaped the first inspection?

A. That is very true. In fact, the whole damage is not ascertained at that time, but when she is in dry dock the body can be seen, which couldn't be seen, of course, when the vessel is in the water.

Recross Examination

By Mr. Young:

Q. You were not present when Captain Tucker made a survey of the vessel, were you, following the accident?

Mr. Wood: On whose behalf?

Mr. Young: I understood it was jointly on behalf of the Pennsylvanian and Western Transportation.

A. I don't recall. I believe I was in Mr. Wood's office at that time. If I could have the actual time I could tell you—I mean [838] the hour and the day and so forth, I would know.

Mr. Young: That is all.

Mr. Wood: That is all.

(Witness excused.) [839]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, certify that Oscar Taylor, who was my assistant in the court reporting business in the year 1941 until the first day of December of that year, and who at that time enlisted in the armed forces of the United States and is now stationed at Fort Knox, Kentucky, reported in stenotypy the oral proceedings had and testimony given upon the trial of the above entitled action heard before the Honorable Claude McColloch, Judge of the above entitled court, beginning July 15, 1941, at 8 o'clock A.M.; that the said Oscar Taylor transcribed certain portions of the testimony [840] adduced upon said hearing for use upon the arguments and briefs shortly following the taking thereof; that thereafter and about the first of September, 1942, Mr. Erskine Wood, of proctors for the American - Hawaiian Steamship Company, Claimant of the *Pennsylvanian*, and Respondent to the original libel, and Cross-Libelant, ordered a transcript of the portion of the testimony and proceedings which had not theretofore been transcribed by Mr. Taylor; that I procured the services of Miss Catherine Mulvey, an experienced stenotype

reporter and who had formerly had experience in transcribing stenotype notes taken by Mr. Taylor, to transcribe that portion of the testimony and proceedings which had not theretofore been transcribed by Mr. Taylor, and said Catherine Mulvey did transcribe said stenotype notes under my direction, personal supervision and assistance; and said transcript so prepared has been by me assembled into two volumes, Volume I consisting of pages numbered 1 to 391, both inclusive, and Volume II consisting of pages numbered 392 to 839, both inclusive, exclusive of this certificate, the pages numbered in typewriting being those transcribed by said Catherine Mulvey and the pages numbered by numbering machine being those transcribed by the said Oscar Taylor personally, as above stated, and to the best of my knowledge and belief said transcript contains a full, true and accurate transcript of the stenotype notes of said Oscar Taylor of said testimony and proceedings. A copy of this certificate is attached to each volume.

Witness my hand at Portland, Oregon, this November 14, 1942.

ALVA W. PERSON

Court Reporter

[Endorsed]: Filed Nov. 14, 1942. [841]

[Endorsed]: No 10316. United States Circuit Court of Appeals for the Ninth Circuit. American-Hawaiian Steamship Company, a corporation, owner of The SS. "Pennsylvanian", her engines, boilers, etc., Appellant, vs. Western Transportation Co., a corporation, owner of the Steamboat "Barry K", etc., and Barges 22 and 24, Appellee, and Western Transportation Co., a corporation, owner of the Steamboat "Barry K", etc., and Barges 22 and 24, Appellant, vs. American-Hawaiian Steamship Company, corporation, owner of The SS. "Pennsylvanian", her engines, boilers, etc., Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 27, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY,

Appellant,

vs.

WESTERN TRANSPORTATION CO.,

Appellee.

and

WESTERN TRANSPORTATION CO.,

Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP
COMPANY,

Appellee.

PENNSYLVANIAN—BARRY K.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD (RULE 19, SUB-
DIVISION 6)

The points on which Appellant, American-Hawaiian Steamship Company, intends to rely on this appeal are the same as stated in its Assignments of Error, which it hereby adopts, with this supplemental statement:

POINT

I.

The collision was caused by the "Barry K's" holding, without excuse, to the wrong side of the channel, and obstinately persisting in that course, at full speed, without stopping or reversing her engines, even after she had recognized the danger by blowing danger whistles. She continued so right into the jaws of the collision. This conduct of hers was the real cause of the collision, and the "Barry K" should be held solely at fault.

DESIGNATION OF RECORD

Appellant designates the entire record as necessary for a consideration of this appeal.

ERSKINE WOOD

Proctor for Appellant,
American-Hawaiian Steam-
ship Company.

Service of the Within Statement of Points and Designation of Record, by certified copy, at Portland, Oregon, this 4th day of December, 1942, is hereby admitted.

CLARENCE J. YOUNG

Proctor for Western Trans-
portation Co., Appellee.

[Endorsed]: Filed Dec. 7, 1942.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD UNDER SUBDIVI-
SION 6, RULE 19, BY APPELLEE AND
CROSS-APPELLANT

The points on which appellee and cross-appellant, Western Transportation Company, intends to rely on its cross-appeal herein are the same as those stated in its Assignment of Errors which are incorporated herein by reference.

DESIGNATION OF RECORD

Appellee and cross-appellant hereby designates the entire record herein as necessary for consideration of this appeal.

CLARENCE J. YOUNG

Proctor for Appellee and
Cross-Appellant.

State of Oregon,
County of Multnomah—ss.

Service of the within Statement of Points and Designation of Record under Subdivision 6, Rule 19, by Appellee and Cross-Appellant, by certified copy, at Portland, Oregon, this 7th day of December, 1942, is hereby admitted.

ERSKINE WOOD

Per (Illegible)

Proctor for American-
Hawaiian Steamship Com-
pany, Appellant.

No. 10316

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
SYLVANIAN," her engines, boilers, etc., 3
Appellant,

v.

WESTERN TRANSPORTATION CO., a corpora-
tion, owner of the Steamboat "BARRY K,"
etc., and Barges 22 and 24,
Appellee,

and

WESTERN TRANSPORTATION CO., a corpora-
tion, owner of the Steamship "BARRY K,"
etc., and Barges 22 and 24,
Appellant,

v.

AMERICAN - HAWAIIAN STEAMSHIP COM-
PANY, a corporation, owner of the SS "PENN-
SYLVANIAN," her engines, boilers, etc.,
Appellee.

**Brief on Behalf of American-Hawaiian Steamship
Company, Appellant, and Appelee, Owner of the
"Pennsylvanian"**

*Upon Appeal from the District Court of the United
States for the District of Oregon.*

ERSKINE WOOD,
WOOD, MATTHIESSEN & WOOD,
1310 Yeon Building,
Portland, Oregon,

*Proctor for American-Hawaiian Steamship
Company, Appellant, and Appellee.*

FILED

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No. 10316

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN - HAWAIIAN STEAMSHIP COMPANY, a corporation, owner of the SS "PENNSYLVANIAN," her engines, boilers, etc.,

Appellant,

v.

WESTERN TRANSPORTATION CO., a corporation, owner of the Steamboat "BARRY K," etc., and Barges 22 and 24,

Appellee,

and

WESTERN TRANSPORTATION CO., a corporation, owner of the Steamship "BARRY K," etc., and Barges 22 and 24,

Appellant,

v.

AMERICAN - HAWAIIAN STEAMSHIP COMPANY, a corporation, owner of the SS "PENNSYLVANIAN," her engines, boilers, etc.,

Appellee.

Brief on Behalf of American-Hawaiian Steamship Company, Appellant, and Appellee, Owner of the "Pennsylvanian"

Upon Appeal from the District Court of the United States for the District of Oregon.

This is an Admiralty appeal from a decision of the Honorable Claude McColloch, Judge of the United States District Court for Oregon.

CONCISE ABSTRACT OR STATEMENT OF CASE

The case arose on a libel and cross-libel to determine liabilities for a collision in the Willamette River between an ocean steamer and a tug and tow. The trial Judge held both vessels at fault, and divided the damages. The question is whether this was error. Each side has appealed, each claiming its own vessel free from fault.

To determine this main question, these subsidiary questions arise:

1. Did the tugboat Barry K violate Article 25 of the Inland Rules, requiring vessels passing in narrow channels to keep to the right in all cases where it is safe and practicable to do so? She admittedly did not keep to the right, claiming it was not safe and practicable to do so, and that a "custom" justified her in going to the left. We, for appellant American-Hawaiian Steamship Company, claim it was perfectly safe and practicable for her to keep to the right, and that she violated the Rule, which no "custom" can possibly override; and that this was a fundamental and proximate cause of the collision. The trial Judge did not pass on this question.

2. Was the Barry K at fault for not stopping or reversing her engines when she recognized danger? We claim that she was. It is admitted that after she recognized danger and signified it with the danger signal, she continued at full speed

ahead until the collision was unavoidable. The trial Judge condemned her for this. We concur. Opposing counsel does not agree.

3. Did the ocean steamer, the Pennsylvanian, fail to stop her engines when the Barry K blew the danger signal? The trial Judge held that she did, and that this contributed to the collision. We contend that this finding of the trial Judge is a misapprehension of the testimony and is not supported by any evidence, even taking the record most unfavorably to the Pennsylvanian. We contend that her engines had already been stopped before the first danger signal, and were reversed at that signal, and that she did everything possible to avoid the collision.

4. Another question is whether the Barry K was negligently navigated, in that her pilot was alone in the pilot-house and her master asleep, and her whole navigation was in charge of this single man, the pilot, without other assistance. We have claimed this as negligence. Opponents deny it. The trial Court did not pass on it.

5. The lights of the Barry K and barges were not in accord with the Regulations. While this indicates a general laxity and disregard on the part of her owners, we do not think it contributed to the collision.

6. It was claimed by the Barry K that the Pennsylvanian should have, at the last minute,

changed her maneuver and gone to the left, and also that she should have dropped anchors. These claims seem to us too extreme to warrant attention.

The foregoing are, we believe, the principal questions involved. They arose from facts shortly to be stated in more detail, and many of which are not in dispute.

But before proceeding to that statement, we should point out that the trial Court's opinion and findings are both of the briefest nature, and left many of the issues undecided. He held only that "The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the Barry K blew the first danger signal." R. 55. And he held that this finding made decision of the other questions "unnecessary." See his memorandum opinion, R. 40.

He thus left undecided what we regard as the main issue in the case,—the violation by the Barry K of Article 25 of the Inland Rules. And so this Court approaches that question as an entirely fresh issue, without the benefit of any opinion or finding by the trial Court. That, perhaps, is unimportant; for we suppose the question is rather a conclusion from the facts than a fact itself.

Now to state the circumstances more in detail:

The collision occurred February 1, 1941, at

about 12:55 a. m. in the Willamette River below the City of Portland, on a calm night, in smooth water, with little current. The locality is known as Post Office Bar. The river there is in a long easy curve (well illustrated by the chart in evidence), and is about 1200 feet wide, with a 30-foot dredged ship-channel 800 feet wide. This channel was in earlier days only 250 feet wide, but, with the progress of time and the necessities of commerce, has been widened by the U. S. Engineers, first to a width of 500 feet, and then, in recent years, to a width of 800 feet; and still more recently the depth has been dredged to 35 feet for a width of 700 feet. The 30-foot channel and the 35-foot channel are almost identical, and are shown on the chart by appropriate lines. The *Pennsylvanian*, an ocean steamer 430 feet long over all, and drawing at the time 19 feet, was going down stream. The *Barry K*, a river boat with two barges lashed to her, one in front and one alongside, was coming up stream. Each saw the other about a mile away, or a little less. "Less than a mile," Norberg, R. 470. (Of course, all distances stated are approximate only.) The *Barry K* was going full speed, making about six miles per hour against the slight current which was running down stream at the rate of not over a mile per hour. The *Pennsylvanian* had just rung up her engines to full speed, but had not attained it, and was making about seven knots. Steamers coming down use the Post Office Bar Range and then swing off it to the right. The

Pennsylvanian, proceeding in that manner, had just left the range when she sighted, about half a point off her port bow, the Barry K showing her red side light and two vertical towing lights, indicating a tow alongside. It is not possible for a steamer in the Pennsylvanian's position to tell at that distance which *side* of the slightly curving river the upcoming boat is on. (We suppose she has a right to assume the upcoming boat will take the right-hand side in accordance with the Rule, i.e., the west side.) Soon after sighting the Barry K, the Pennsylvanian received from her a single whistle blast. The distance apart at that time was estimated by both pilots at three-quarters of a mile, but, judging from the comparatively short lapse of time in which subsequent events occurred, may have been closer. This single blast from the Barry K the Pennsylvanian answered with a like single blast, and understood and prepared for a port passing, i.e., to the right, in accordance with Article 25. The Barry K claims that her signal was two blasts, not one, and that she desired a starboard passing in accordance with an alleged long-established "custom" for towboats to come up on the left-hand side, in the shallower water, leaving the main ship channel to the steamer.

Shortly after this exchange of signals, the Barry K showed her green light to the Pennsylvanian. The 'Pennsylvanian's navigators took this to be merely a temporary sheer, as often oc-

curs, and as the distance was still great enough ("at least a quarter of a mile," Vaux, R. 559), ("about a half a mile," Nelson, R. 612) to permit the Barry K to correct this and resume her supposed course to the right, the Pennsylvanian was not alarmed, but did, out of extra precaution, stop her engines. This was at 12:54 (to the nearest minute only) by the Bridge Bell Book. Shortly thereafter the Barry K blew danger whistles, a series of rapid blasts, how many is uncertain. The Barry K claims that these blasts were four and two and four and two, meaning two danger signals, each followed by two blasts for a starboard passing. The Pennsylvanian, on the contrary, says they were not thus separated and defined, but were just a succession of short and rapid blasts, i.e., a danger signal. As soon as these blasts were received, the Pennsylvanian immediately reversed her engines. At this time the Barry K was, of course, still showing her green light and, due to the Pennsylvanian's swing to the right for a port passing, had become about two points on the Pennsylvanian's port bow. When the Pennsylvanian reversed her engines, she blew the required signal of three blasts, and when the Barry K heard this she followed it by reversing her engines and likewise blowing three blasts. It is impossible to make any close estimate of the distance apart the ships were when they reversed their engines, since the witnesses are not sufficiently definite, but it is obvious that they were close enough so that thereafter they were unable

to prevent collision. Both the reversing of the Pennsylvanian's engines, and the subsequent collision, are recorded in the Bridge Bell Book as having occurred at 12:55 a. m. But, with the system of recording to the nearest minute only, it is apparent that as much as 59 seconds could elapse between these two events. Nelson, who actually did the recording, says the interval was about "a half to three-quarters of a minute." R. 616. Captain Vaux thought about 45 seconds. R. 563.

During all the period from the time the Barry K blew her first signal until she finally reversed her engines (which was not until after the Pennsylvanian had reversed hers), the Barry K, although realizing that the Pennsylvanian had either misunderstood or disagreed to her alleged two blasts, kept going ahead at full speed. She kept blowing danger signals, but she never stopped or slackened speed in any manner. She kept right on ahead. Her pilot's excuse is that he was "figuring any moment he" (the Pennsylvanian) "would understand the two whistles, he would swing back into his regular course and proceed on down to my starboard side." R. 123. Same, 127; and that he wanted to get out of the ship channel entirely and into the shallow water on the east side. He did not succeed in doing this. He never got into the shallow water. (See place of collision marked on chart.)

The collision occurred on the eastern edge of the dredged ship channel, leaving approximately

800 feet of deep clear channel through which the ships could have passed port to port in accordance with Article 25 had the Barry K not elected to the contrary. The place of collision is marked on the chart by both pilots, and they are agreed on the location.

The Pennsylvanian's stem struck the starboard quarter of Barge 22, which was being pushed ahead on the nose of the Barry K. Considerable damage was done to that barge and her cargo, and also to the Pennsylvanian, but the damages have been stipulated and agreed, and we are not concerned with them here.

SPECIFICATIONS OF ERRORS

The specifications of errors on which this appellant relies are the same as those stated in its Assignment of Errors, R. 64-66, and in its Statement of Points, R. 902-903. These are that the Court erred in the following particulars:

I

In not holding that prior to and at the time of the collision the "Barry K" and her barges were being negligently navigated on the wrong (left-hand) side of a narrow channel (Willamette River), in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision.

II

In not holding that the "Barry K" and her barges were being negligently navigated at the time of the collision, in that the pilot was navigating the boat alone in the pilot house, with the master asleep, and that this proximately contributed to the collision.

III

In not holding that the "Pennsylvanian" was carefully navigated throughout and was free from fault, and in not entering a decree in favor of American-Hawaiian Steamship Company accordingly.

IV

In not holding that when the "Barry K" blew her first danger signal, the engines of the "Pennsylvanian" had already been stopped and were still stopped, and in not holding that they were reversed full speed astern at the time of said danger signal.

V

In holding that "The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the 'Barry K' blew the first danger signal." (Findings of Fact.) R. 55.

VI

In holding that the "Pensylvanian" "failed to stop engines when the 'Barry K' blew the first danger signal," R. 55, and in not holding that they were already stopped, and were reversed, at that signal.

VII

In holding that both vessels were to blame, and that it was a case for divided damages.

VIII

In entering the final decree of August 20, 1942, holding both vessels to blame, and apportioning the damages on a basis of mutual fault.

IX

The collision was caused by the "Barry K's" holding, without excuse, to the wrong side of the channel, and obstinately persisting in that course, at full speed, without stopping or reversing her engines, even after she had recognized the danger by blowing danger whistles. She continued so right into the jaws of the collision. This conduct of hers was the real cause of the collision, and the "Barry K" should be held solely at fault. The trial Court erred in not so deciding.

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED ON

These are the same as just stated, and will be found on pages 64 to 66 and on page 903 of the Record.

ASSIGNMENT OF ERROR I ARGUMENT

We address ourselves first to the proposition that the Barry K coming up the river on the left-hand side, violated the narrow channel rule (Article 25 of the Inland Rules, USCA, Title 33, Chap. 3, Sec. 210), and that this was the primary, real, and fundamental cause of the collision. It is covered by Assignment of Error I, that the Court erred "In not holding that prior to and at the time of the collision the 'Barry K' and her barges were being negligently navigated on the wrong (left-hand) side of a narrow channel (Wilamette River), in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision."

In our view, this was the fundamental cause of the collision, beside which all other considerations pale. There is no more important rule of the road than the one here in question,—Keep to the Right. It is a statutory adoption for Inland Waters of the long pre-existing "great rule of the road, 'Keep to the Right,' " as it was called by the District Court in *The Victory*, 63 Fed. 631, 635. (We digress to say that the Victory collision oc-

curred before the statutory Inland Rules were enacted, although the Court's opinion was rendered afterward.)

The rule itself is explicit:

“Article 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.”
USCA Title 33, Ch. 3, Sec. 210.

This is “a statutory rule which has long been enforced rigidly.” *Marshall Field & Co. v. United States*, 48 F. (2d) 763, 765. And if pilots adhered to it, there would be far fewer collisions. It is when some pilots of an Association, as here, set themselves up above the law and try to establish a custom, to override a statute of Congress that uncertainty and trouble occur.

A mere statement of the channel conditions where this collision occurred makes the Barry K's violation of the Rule so obvious that it seems to us argument is almost superfluous. Observe the conditions: A river 1200 feet wide. A channel 800 feet wide, and 30 feet deep. No sharp bends. But, instead, a long easy curve. No appreciable current,—less than a mile an hour. A calm night. Only a slight breeze from the east. Only seven miles an hour by Government records. Visibility good. A stern-wheel towboat, (sternwheelers are notoriously the easiest to handle, and in fact are built so for that purpose); powerful to do her

work; and even equipped with "monkey rudders" to render her still more maneuverable; not encumbered by a long tow like log rafts on a tow-line, but, instead, pushing one barge ahead on her nose and having the other lashed alongside, the whole combined tug and tow being only 325 feet long. She was also maneuvering *against* such current as there was. And it is a well-known fact that to maneuver against the current is easier than with it.

When the Barry K says that she could not with safety and practicability keep to the right, she is confronted with these facts:

Large ocean steamers (far less maneuverable than she) *always pass each other at this point port to port, i.e., to the right.* R. 131, 158.

They have always done so, even when the channel in former times was *only 250 feet wide.* R. 220. Could not the Barry K do it, now that the channel is 800 feet wide?

Towboats, meeting each other there, pass on either side as agreed. It is "as liable to be one way as the other." Reed, R. 150. (If a towboat can come up the right-hand side to pass another towboat, it is hard to see why she cannot do the same to pass a steamer.)

The Barry K successfully and without difficulty, encumbered with just such a tow as this, customarily navigates up the Willamette River all

through the harbor of Portland, and through the numerous drawbridges, with their comparatively narrow clearances, one only 100 feet,—all without any trouble; and *keeps to the right*, in so doing. R. 147-148. She even goes on up to Oregon City with her tows, R. 146, ten or twelve miles of a narrow, tortuous channel. Is it credible, then, that she could not keep to the right in a channel 800 feet wide?

On this very night in question she was planning to pick up a third barge in Portland Harbor and proceed up stream with it. So she certainly was not encumbered with a heavy tow.

A mere glance at the chart, with special reference to the point of collision, as marked by both pilots, shows that the *whole channel*, 800 feet wide, would have been clear for the Barry K to pass up on the right-hand side. Certainly, if the Pennsylvanian had kept to her right-hand side (even though not to the extreme degree she did to avoid the collision), and the Barry K had kept to her right-hand side, there would have been *several hundred feet of clear water between them*. Indeed, Pilot Reed of the Barry K had to admit this. He said that *he could have come up on the right-hand side safely and still have left 600 feet of deep water for the Pennsylvanian to come down in*. R. 135-136.

Many of the Barry K's pilot witnesses made substantially the same admissions. Pilot Stayton

said that a river boat with tow could come up the west side (right side) of the channel and meet an ocean steamer coming down and that there would be "plenty of clearance in there all right" if the steamer was "in the center of the channel," R. 203. And that a steamer around 400 feet long should leave "at least 100 feet" between her and the tow. R. 204. (If a steamer, even though "in the center of the channel," still leaves room for a towboat to pass to the right—as this testimony indicates—then it is obvious that if the steamer does her duty, and keeps to the right of the center, the towboat would have still more room.) This same pilot also testified that a towboat coming up the right-hand side would leave 600 to 700 feet of clear channel for the down-coming steamer to pass, and that the passage to port would be perfectly safe. R. 224. And he testified before the Steamboat Inspectors that "There is room enough for an up-coming river boat and a down-going ocean steamer in that channel to pass port to port, providing there is no other ocean steamer in the vicinity." Confronted with this testimony, he said: "Yes, sir, I say so yet." R. 225. And he testified again that an ocean steamer, going down stream, could keep in the center of the channel, and not move over to the right, and there would still be room for the upcoming towboat to pass to the right. R. 226.

Boone, another pilot witness for the Barry K, admitted that if it was sure that the down-coming ship would keep to her own right (as of course

she is in duty bound to do), then the up-coming towboat "would be all right" if she also kept to the right. R. 290.

Indeed, Reed, pilot of the Barry K, himself, in effect, admitted that he had no right to come up the left-hand side, when he testified that when he blew his alleged signal of two blasts it was only a "request" which the Pennsylvanian did not have to accede to; that it was merely an invitation to the Pennsylvanian to make a starboard passage, which the Pennsylvanian did not have to accept, and that if the Pennsylvanian had accepted it, the burden of risk was on the Barry K to keep out of the way by getting into the shoal water, and that the Barry K did not fulfill that obligation. R. 124-125. This testimony can only mean that Reed knew that he could have passed to the right, but he preferred to pass to the left, and elected, for his own convenience, to do so, and took the risk.

Pilot Ackerman, another witness for the Barry K, let out the real reason for towboats coming up the left-hand side, in violation of the rule, when he said that "from old time customs we are in the habit of figuring on them being on the east side of the river, towboats coming up and down." R. 240. In short, though the custom, such as it is, originated back in the time when the channel was only 250 feet wide and the towboats left it to the ocean steamers, and themselves took to the shoal water, they have from "habit" continued

the "custom," though all reason for its existence has long since ceased with the widening of the channel to 800 feet.

And pilot Fowler, another witness for the Barry K, admitted that they did it for reasons of convenience. He said that it is "much more convenient" for the towboats to come up on the left-hand side; R. 437, since the current is "slacker there" and that is a shorter route for the tugs and tows to reach their destination, and is "the same as cutting corners." R. 438. But of course, as the courts have stated many times, "convenience" is no justification for violating the law.

The excuses put forth by the Barry K to try to show that it was not safe and practicable to keep to the right are of the flimsiest. The 10 or 15-mile breeze which she claimed might have set her in toward the right-hand bank, became, by the Government's own records, a gentle 7-mile zephyr. Hardly discernible. Of course, even if it had been 15 miles, it would have amounted to nothing. And the shield against this "breeze," which the Barry K gave as one reason for taking the left-hand side, proved to be only a fringe of willows 20 feet high. (It is curious that if wind against the housing and pilot house of this towboat, were, as claimed, an adverse factor in its navigation, the owners should have materially increased the wind-exposed surface sometime before the accident, by raising the pilot house seven feet and putting on two additional cabins. R. 307-

308.) That demon, the “kick water” from the Pennsylvanian’s propeller, which was supposed to have had a tendency to throw the Barry K in on the right-hand bank, turned out to be, as indeed anyone would know, merely the thrust from the Pennsylvanian’s propellers directly *behind her*, and not in the direction of the Barry K, but deflected *away* from her, by the Pennsylvanian’s right rudder. The same exaggeration appears in regard to the supposed displacement swell of the Pennsylvanian.

The real truth of the matter is that the Barry K’s counsel so well recognized the difficulty of proving that the boats could not have safely passed to the right, that he was forced to rest his case on a very novel and peculiar thesis. He does not deny that there are many times when tugs and tows can safely pass ocean steamers at this point port to port. Indeed, he finds it difficult—in the face of his own witnesses—to claim that the Barry K could not have done so at this time. But he claims that because oftentimes it may be easier and more practicable for tugs and tows to come up on the left-hand side (which we do not admit), therefore a custom has grown up, and that “safety and practicality” depend on this custom being uniform; and so, no matter how safe and practicable it may be to pass port to port in a given instance, nevertheless, the vessels must pass to starboard so as to keep the custom uniform. This, of course, can not be the law. Ves-

sels must be governed by conditions as they exist at the time, and if it is safe and practicable to pass to port at that time, they must do so. The contrary position is so novel that, lest your Honors think I overstate it, I quote what counsel said:

“Mr. Young: If the Court please, yesterday your Honor was inquiring of me with respect to our theory on the matter of custom. I wanted this morning to amplify one of the answers which I made. It is our position that with respect to whether or not *is* (it) was either safe or practicable for river boats to use the west side of the river *that depends not necessarily upon conditions that may exist at any particular moment of time*, but, rather, upon conditions which are changing from time to time and over long periods; that is to say, conditions with respect to the matter of the direction of the wind, its violence and velocity, the amount of current in the stream, stormy weather, day, night, the number of vessels which may be present or about Post Office Bar at the time that any particular river boat or tug is about to pass, and so forth.

Mr. Wood: You mean depends on the circumstances at the time of the passage?

Mr. Young: *No, I am stating exactly the opposite, that it does not necessarily depend upon that.* Conditions at the time of the passage may be peculiarly dangerous at that particular point of time, but the custom upon which we rely and which is built up upon factors of safety and practicality is based upon these changing conditions over periods of time extending back as far as 40 to 45 years ago. Now, in view of the circumstance that the amount of danger which might exist to any particular river boat

with its tow in passing Post Office Bar might vary from time to time. *In the interest of uniformity the custom has grown up toward the end that there will not be chaos in the matter as to which side of the river the river boats may be expected to be upon. In other words, the long series of circumstances based upon factors of safety and of practicality have produced this uniformity in the practice to which I refer.*" R. 691- 692. (Italics ours.)

In short, counsel thinks that because *sometimes* it may not be safe and practicable for tugs and tows to come up on the right (to which we do not accede), therefore, they must *never* come up on the right, but instead, a uniform custom must be adopted to come up on the left, and that safety and practicability depend on the uniformity of the custom, and therefore the custom does not violate Article 25. We submit that this can not be the law. If we must have uniformity (which is desirable), let it be uniformity in observing Article 25, rather than uniformity in observing a custom that violates it.

If Congress had intended to permit navigation on the Columbia and Willamette Rivers to be governed by a custom, as here contended for, it would not have enacted Article 25 of the Inland Rules for those rivers. Instead, it would have expressly omitted Article 25, as it did in the Code governing navigation on the Mississippi. Title 33, Ch. 5. It is the custom on the Mississippi "for the ascending vessel to come up under the points, in order to get the benefit of slack water, while

the descending vessel runs the bends, keeping in or near the middle of the river, in the thread of the stream, to get the benefit of the current." *The Stephen R. Jones*, 27 F. (2d) 208, 209. This is the very custom contended for here by the Barry K. But the fact that in the Mississippi Rules, Article 25 is expressly omitted, so as to permit the custom to operate where applicable, is a clear indication that if Congress had had any such intention with reference to the Columbia and Willamette Rivers, it would have made the same omission. The fact that Article 25 of the Inland Rules is included in the Code for those waters, Title 33, Ch. 3, Sec. 210, is the clearest indication that Congress did not intend to permit such a custom. The truth is that some of the pilots here, just as the pilots did in the *Acilia* case at Baltimore, cited hereafter, have attempted to set themselves up as superior to the law of Congress.

The omission of Article 25 from the Mississippi Rules makes all of the Mississippi decisions inapplicable here. Some of them besides *The Stephen R. Jones* are *The John D. Rockefeller*, 272 Fed. 67, and *The Albert Dumois*, 177 U.S. 240.

Neither are any of the Hell Gate cases in point. Hell Gate, as is well known, and as its name implies, is an especially dangerous piece of water with a very sharp bend and extreme currents, and is governed by a special statute,—the East River Statute.

The cases which hold that no custom can justify a violation of Article 25 are numerous. Some of them, with excerpts from the opinions, follow:

Occidental, Etc. v. Smith, 74 F. 261, where this Court condemned in these words an alleged custom for vessels entering the Golden Gate to take the north or left-hand side:

“We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom, and, if it be true that there is such a custom, it is bad in principle, and contrary to law, and the courts will not recognize it as affording any ground for exempting a vessel from liabilities incurred by disregarding the law.” (Citing the *Victory*.)

The Acilia, 120 F. 455, where the Court condemned an alleged “custom of pilots, going to and from the port of Baltimore, of giving the laden vessel coming down the easternmost side of the channel, where the water is deeper, and of the lighter laden vessel taking the westernmost side, where the water is shallower.” (Page 457.) (Note how similar this is to the excuse offered by the Barry K.) The Court condemned this in strong language, too long to quote, and said that,

“It is not to be endured that certain of the pilots shall arbitrarily pursue a course in opposition to the law.” (Page 458.)

★ ★ ★ ★ ★ ★

And,

“I have been for a long time disturbed by observing how little attention is paid by many of these members of the Pilot Association to the

regulations prescribed by Congress, and by the United States supervising inspectors under authority of Congress, for preventing collisions. They seem often to be arbitrary and opinionated in their notions of navigation, and indifferent to the fact that it is the owners of these large and valuable steamships, and not themselves, who have to pay for their neglects." (P. 462.) (Language very apropos to the attitude of those members of the Columbia River Pilots Association who testified for the Barry K in this case.)

The Booth, 127 F. 453:

"There was evidence in this case that it was the custom of tugs with long tows to pass to the east of the main channel in order to keep out of the way of large steamers traversing the main channel (the Barry K's excuse exactly), but, of course, no custom can justify a violation of a United States statute." (Page 455.) (Citing *Occidental Co. v. Smith*, *supra*.)

The Transfer No. 10, 137 F. 666:

"These rules in this case made it the duty of these transports to be on the right-hand side of the center of the stream, and, in point of fact, admittedly they were on the left. The fact that it may be the custom to do this when there is an ebb tide, and that it may be easier to go up on the New York side than on the other side, and that they thereby can go a little faster" (just like the Barry K) "does not alter the fact that any vessel that goes up in that way violates the law and takes the risk, and, if there is any collision, is presumably in fault." (Page 666.)

The Hokendauqua, 270 F. 270:

"The tide is not unduly strong, even at its

topmost strength, barely more than a knot, and no reason appears to me why a variation from the rule should be recognized as a valid custom. * * * In point of fact, I consider it proven that this 'custom' of tows that leave Hammond's Flats bound east to hug the Throgg's Neck buoy is one devised for their own convenience, not based on any necessity of navigation, distinctly not tending to safety, and by no means universal. It is therefore for every reason bad." (Pages 271-272.) All like the Barry K.

The Black Diamond, 273 F. 811:

"The rule made it the duty of the Black Diamond to be on the right-hand side of the center of the stream, and not on the left. The fact that there was a strong ebb tide, and that by custom some navigators took chances by being over on the New York side, so as to go faster does not alter the fact that, when a navigator takes this chance, he violates the law and takes the risk. If a collision occurs, his vessel is presumptively at fault." (Page 813.)

Lehigh C. & Nav. Co. v. Compagnie, Etc., 12 F. (2d) 337:

The Doane blew two blasts to take the left-hand side of a narrow channel, because,

"her tow was so heavy that she had more difficulty in stemming the ebb tide than running, when keeping to the eastward or her own starboard side, than she hoped to encounter on the other side close by the anchorage grounds. Her witnesses assert a custom for tows so embarrassed to do what she wanted to do." * * *

"We do not think the custom proved; but, if it were, it would be bad in law, because com-

pliance therewith would violate positive statutory enactment.” (Pages 337-338.)

Marshall Field & Co. v. United States, 48 F. (2d) 763:

“The exception to the statutory requirement of a port to port passing finds its proper application not in convenience but in *necessity*.” (Pages 765-766.) Our italics.

The Priscilla, 55 F. (2d) 32:

“The *Priscilla* contends that it was the custom for boats going up the river to take the southerly course. But the infringement of article 25 in such a place as this cannot be controlled by any alleged custom. The *Alfred W. Booth* (C.D.) 127 F. 453; *The Georgia* (C.C.A.) 18 F. (2d) 743, 744. In the latter case it was held that navigating the East River on the wrong side in violation of a statute was ‘a fault that *custom* or even *convenience* will not excuse.’ ” (Page 36.)

A. H. Bull S.S. Co. v. Chesapeake S.S. Co., 101 F. (2d) 599:

“While, as stated by the judge below, it seemed to be the custom to violate this rule yet the fact that the rule was more honored in the breach than by the observance does not justify its violation. Custom no matter how long persisted in cannot make dangerous procedure safe.” (Page 601.)

TESTIMONY OF THE PILOTS

There is in this case the usual testimony of pilots on both sides of the question. These men testified as “experts.” It seems to us that their

conflicting testimony really adds little to the case. The width and depth of the channel speak for themselves and make the port passing obvious. But if the testimony of the pilots is to be considered, this should be pointed out: There are two groups of pilots on the river. The Columbia River Pilots Association and the so-called Independent Pilots. They comprise two hostile factions. Pilot Norberg, who was piloting the *Pennsylvanian*, is an Independent pilot. All of the pilots who testified as experts against him are members of the Columbia River Pilots Association. Furthermore, all the towboat men, like Reed of the *Barry K*, while not members of the Association, are members of the same Union to which the Association also belongs—Local 17. R. 787. So that there is a natural affinity between them, as against the Independent Pilots, who belong neither to the Union nor the Association. A further consideration is that all members of the Columbia River Pilots Association are themselves former towboat men. They have learned the channel of the Columbia and Willamette Rivers while serving as mates or captains of towboats, and have later graduated into piloting ocean steamers. Therefore, they are disposed to favor their former brethren of the towboats,—in this case, Reed.

We have said enough now on the *Barry K*'s violation of Article 25, which we think was a fundamental cause of the collision, and proceed to a consideration of another cause, equally fundamental.

SPECIFICATION OF ERROR IX

THE BARRY K's PERSISTENCE IN KEEPING
ON THE LEFT-HAND SIDE AND FAILING TO
STOP OR REVERSE HER ENGINES WHEN SHE
KNEW THAT A DANGEROUS SITUATION
HAD ARISEN

ARGUMENT

It is not necessary to say much on this, because it would be hard to find a case where a vessel had more flagrantly run full speed into a collision. These are the admitted facts taken from the mouth of Pilot Reed himself:

The Barry K, blowing an alleged two blasts, received one in return from the Pennsylvanian, which Reed knew meant that the Barry K's signal had been either misunderstood or disagreed to. R. 113. Reed says that he then blew a danger signal, four blasts, followed by two, repeating his request for a starboard passing. But he did not slow or stop or reverse. He kept full speed ahead, and blew, he says, another signal of four blasts followed by two. He still kept full speed ahead. Asked why he did so, he said that the Pennsylvanian was "coming directly head-on, kept coming, and I thought any moment he would hear my two whistles and pull back into his regular course at that point." R. 127,—this in face of the fact that the Pennsylvanian had blown him one blast indicating a clear intention to keep to the right. Reed still kept on full speed, and did not reverse his engines until *after* the Pennsylvanian had reversed hers and blown Reed the required signal of three blasts to indicate "my engines are going full astern"; which finally brought Reed to his senses, and he himself reversed.

It needs no precedents of decided cases to condemn such conduct as this, and we cite none. Judge McColloch rightly found the Barry K at fault in this particular. We concur, and say no more about it.

ASSIGNMENT OF ERROR II

THE BARRY K WAS BEING NAVIGATED BY HER PILOT ALONE, THE MASTER BEING ASLEEP, AND NO OTHER OFFICER ASSISTING.

The Court erred: "In not holding that the Barry K and her barges were being negligently navigated at the time of the collision, in that the pilot was navigating the boat alone in the pilot house, with the master asleep, and that this proximately contributed to the collision."

We do not claim here that there was insufficient "lookout." The boats saw each other far enough apart to render questions of lookout immaterial. We do claim that to leave the whole responsibility of navigation in a channel such as the Willamette River on a pilot alone, with no officer assisting, is not the exercise of that care which the circumstances require. Contrast the two ships in this instant case. On the Pennsylvanian's bridge were her master, a pilot, and third officer. A helmsman was at the wheel, and a lookout forward. On the Barry K was Pilot Reed alone. He had to observe the approaching Pennsylvanian, the ranges and shore beacons, deter-

mine his course, blow his own whistles, listen for the Pennsylvanian's, and answer them, steer his ship, and ring his own signals to the engine-room. There was nobody to assist him in any of these actions. Nor anyone with whom to consult. The only person near him was the "watchman," Kelly, standing in front of the pilot house, whom he sent to call the crew when the collision seemed imminent.

We think it is not too much to suppose that if Captain Williams had been in the pilot house with Pilot Reed, his judgment would have prevented the collision. The responsibility was too much for Reed alone. We do not claim this as negligence in any degree comparable with the violation of Article 25 and the forging full speed ahead into the collision without ever stopping or reversing; but we do claim it is negligence of lesser degree; and certainly it indicates a general laxity in the navigation of these towboats similar to their laxity in carrying improper lights, and with the laxity of their management in issuing no instructions to their pilots to obey Article 25, even after the Steamboat Inspectors had officially decided in Captain Reed's case that it should be obeyed. R. 837-838.

ASSIGNMENTS OF ERROR III, IV, V, VI, VII, VIII.**R. 65-66**

THE PENNSYLVANIAN WAS WITHOUT FAULT AND THE TRIAL JUDGE ERRED IN HOLDING THAT SHE DID NOT STOP HER ENGINES AT THE FIRST DANGER SIGNAL. SHE HAD ALREADY STOPPED THEM: AND REVERSED THEM AT THE FIRST DANGER SIGNAL.

We now address ourselves generally to the navigation of the Pennsylvanian, and particularly to the Court's error in holding that she did not stop her engines at the first danger signal. We think this is a clear oversight on the trial Judge's part as to what the testimony actually was. These matters are covered by Assignments of Error III, IV, V, VI, VII and VIII, and this argument is addressed to all of them. These assignments are:

The Court erred,

III

"In not holding that the Pennsylvanian was carefully navigated throughout and was free from fault, and in not entering a decree in favor of American-Hawaiian Steamship Company accordingly.

IV

"In not holding that when the Barry K blew her first danger signal, the engines of the Pennsylvanian had already been stopped and were still stopped, and in not holding that they were reversed full speed astern at the time of said danger signal.

V

“In holding that ‘The collision was the proximate result of negligent handling of both vessels in that they failed to stop engines when the Barry K blew the first danger signal.’ (Findings of Fact.) (R. 55.)

VI

“In holding that the Pennsylvanian ‘failed to stop engines when the Barry K blew the first danger signal,’ (R. 55), and in not holding that they were already stopped, and were reversed, at that signal.

VII

“In holding that both vessels were to blame, and that it was a case for divided damages.

VIII

“In entering the final decree of August 20, 1942, holding both vessels to blame, and apportioning the damages on a basis of mutual fault.”

ARGUMENT

The important point is the Judge’s error in holding that the Pennsylvanian did not stop her engines at the first danger signal, and therefore we speak of that first. This is the only fault he found with the Pennsylvanian. See his opinion, R. 40, and his Findings, R. 55.

What confused the trial Judge was a conflict in Pilot Norberg’s testimony. Pilot Norberg was not a good witness. He was not clear and exact,

nor always consistent. But he was perfectly honest. We believe your Honors can judge of these qualities by the reading of his testimony. He got mixed up in his first testimony, and testified erroneously that when he got a "group of blasts" from the Barry K, he "slowed down," "and held my course along the land there and stopped." (The Bell Book showed that the "slow" and "stop" were really one signal. Cf. also to the same effect, Vaux, R. 559-60 and Nelson, R. 614.) This testimony of Norberg's is at R. 475.

At R. 513-514 he again testified erroneously that when he heard this group of blasts from the Barry K, he ordered "either half speed or stop."

"Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do?

A. Well, we will call it half speed, then."

(It is apparent from his previous answer that it was "either" half speed or stop, and from his saying that "we will call it half speed," that he was not saying certainly which order he gave, and, in fact, since one followed immediately on the other, did not regard it as of importance.)

At R. 529 he testified that the half speed and stop orders were really the "same signal"; that a "split second" intervened; that both were given at 12:54. And then this testimony occurred:

“Q. Now, at 12:54—

A. Yes.

Q. —why did you stop then; what did you hear from the other ship which caused you to stop?

A. A danger signal.

Q. Was that the first one you heard?

A. Yes.”

All this testimony was really in error, as he had *already* stopped; and at the danger signal he *reversed*. The testimony of Captain Vaux, Third Officer Nelson, and the original report to the U. S. Steamboat Inspectors, Respondent's Exhibit 12, all show it. And when Pilot Norberg refreshed his memory from the original report which he had signed, he corrected this testimony. So, to the extent to which a man who gives mistaken testimony can retract it, this testimony does not exist. But your Honors will observe that not even *this* testimony says that the Pennsylvanian's engines were not *stopped* at the first danger signal. In fact, it says that they *were*. And the trial Judge really snatched out of the air somewhere his finding they were not stopped. We do not know where he got it. It is nowhere in the record.

The real truth is that the Pennsylvanian's engines were stopped as a precaution, when the *Barry K* first showed her green light. This was before any danger signal was blown. Later, when the so-called “first” danger signal was blown, the Pennsylvanian reversed her engines immediately.

The true facts appear from the following:

First: The Report to the U. S. Steamboat Inspectors made jointly by Captain Vaux and Pilot Norberg himself (Respondent's Exhibit 12) says that:

"As we approached closer, the 'Barry K,' which had up to that time been showing her red light, showed her green side light, and shut out the red. She was still far enough away, however, to resume the port to port passage. *Nevertheless, as soon as we saw her green light, we slowed to half speed and stopped, the stop order following immediately on the half speed.* The bridge Bell Book entry for this is at 12:54 A. M., which, however, is only to the nearest minute. Shortly after we had stopped our engines, *the 'Barry K' sounded several short and rapid blasts, understood by us to be the danger signal, and we immediately put our engines full astern* and wheel hard right, and Pilot Norberg sounded three short blasts of the steam whistle to designate engine running full astern." R. 704-705.

This report was made at Portland, Oregon, February 1, 1941, the very day of the accident, when the facts were fresh in the minds of both men who signed it, Captain Vaux and Pilot Norberg. It appears at R. 703-706, and was offered in connection with Pilot Norberg's corrected testimony, and was admitted at R. 861.

Second: Captain Vaux, who was a clear and accurate witness, and, Counsel will not deny, the highest type of shipmaster, testified very clearly

and unequivocally that his ship's engines were stopped when the Barry K's green light first appeared, and were later reversed, immediately on receipt of the Barry K's danger signal. This testimony is as follows:

“Q. All right. Let's get back to the first danger signal you heard from the Barry K after she had shown her green light. When you received that danger signal, what did you do on your ship?

A. I didn't do anything.

Q. I don't mean you yourself; I mean what was done on your ship?

A. The first danger signal the engines had been put to slow and stop previous to that after the green light was visible and when the danger signal came through, it was understood as a danger signal, the engines were put full speed astern. I place that time in reference to the bell book, if they want the exact times.

Q. That is when the green light first appeared, you went half speed?

A. Half speed and then stop, one bell following upon the other. In the bridge bell book the times are kept to the nearest minute. Fractions of minutes are not logged in the bridge bell book; the engine room bell book they are.

Q. Is it your recollection that you put her at half speed and stop as soon as you saw this green light or an appreciable time afterwards?

A. Very shortly after, almost instantly but very shortly after.

Q. And then later you heard the danger signal and then you—what did you do then?

A. After the danger signal?

Q. Yes.

A. The engines were put full speed astern."

R. 548-549.

Captain Vaux testified to the same facts again, more in detail, R. 559-561. This testimony follows:

"Q. Then when she swung and showed her green light to you, approximately how far apart were the vessels at that time, would you estimate?

A. At least a quarter of a mile, I should judge.

Q. Now, what did you do with the engines of your ship when that green light appeared?

A. The pilot ordered the engines to half speed and then stop, one bell following upon the other.

Q. Well, one bell following upon the other might mean immediately or it might mean with an interval between; which do you mean?

A. A slight interval between.

Q. How much of an interval?

A. A fraction of a minute.

Q. Yes. Now, you have already testified that when that green light first appeared, the vessels were far enough away that you regarded it as safe for her to swing—

The Court: Mr. Wood, pardon me. I suppose some mechanical considerations enter into the time within which they may follow a half speed with a stop?

Mr. Wood: Oh, yes.

The Court: I suppose what he means is that they stopped the engines as quickly as they could.

Mr. Wood: Q. Is that what you mean, Captain? What do you mean when you say half speed and then stop? The Court wants to know whether that means you stopped as quickly as you could or what do you mean?

A. Yes, we stopped as quick as she could. On the telegraphs, your Honor, when they are rung to a slow or to a stop, whatever the bells may be, that telegraph is answered from the engine room and the order is carried out almost instantaneously.

The Court: Q. That isn't what I want light on. A certain situation develops and calls for stopping the engines in the judgment of the pilot; does he stop them or must he first reduce them to half speed?

A. He can stop them immediately, sir.

Mr. Wood: Q. Now, you have already testified, Captain, that when the green light of the Barry K first appeared, you thought it was just some temporary sheer of the vessel and that the ships were far apart, so you thought it was all safe, and she could resume her course; do you remember testifying to that?

A. Yes, sir, I do.

Q. Now, if that is what you thought, why did you half speed and stop?

A. The idea in meeting a vessel is to slow down and in this particular instance it was to give her a chance to right herself without involving a situation that would call for drastic action.

Q. Had you up to that time of your stopping your engines received any danger signal from the Barry K?

A. No, sir.

Q. Well, when did you receive a danger signal from the Barry K, the first one?

A. The first one. She had been showing green for approximately a minute when the first danger signal sounded and at that time the Pennsylvanian's engines were stopped" (he means *already* stopped) "and when it was understood to be a danger signal, the engines were put full astern at that time and a hard right rudder was ordered at the same time.

Q. You say when you received the first danger signal the engines of the Pennsylvanian had already been stopped?

A. Yes, sir.

Q. You are referring to this stop order that you have just been testifying to?

A. That is the one, yes.

Q. In other words, they continued stopped from that stop order until you reversed full speed astern, did they?

A. Yes, sir.

Q. You said that you reversed full speed astern when the danger signal from the Barry K was understood to be a danger signal. There wasn't any doubt about its being a danger signal, was there?

A. There was no doubt whatsoever that it was a danger signal.

Q. In other words, when you got that first danger signal, did you reverse your ship at once?

A. Yes, sir." R. 559-561.

Third: Third Officer Nelson testified to the same effect:

"Q. And what was done with your engines on your ship when the Barry K's green light appeared?

A. The engine was put half ahead" (from full ahead) "and then stopped, almost immediately afterwards." R. 612-613.

* * * * *

"Q. Then at 12:54 your entry shows half ahead, stop?

A. Half ahead and stop.

Q. And those bells followed immediately one on the other, you say?

A. Yes, sir, they were some seconds apart, a few seconds.

* * * * *

Q. Now, at that time had you received any danger signal yet from the Barry K?

A. No, sir.

Q. Now, about how long after that did you give the full speed astern?

A. About a minute.

Q. Yes. And what was the reason for you giving that full speed astern?

A. The Barry K had blown a danger signal.

Q. The first one?

A. The first one, yes, sir.

Q. On receipt of that first danger signal from the Barry K, your engines were put full speed astern; is that what you mean?

A. The Pennsylvanian's engine was put full speed astern and the pilot blew three short blasts of the whistle to indicate that fact.

Q. I say, was that done immediately you heard the danger signal from the Barry K?

A. Immediately.

Q. And because of that danger signal?

A. Because of that, yes, sir." R. 614-615.

Fourth: Pilot Norberg, recalled to the witness stand, and having refreshed his memory from his Report to the Inspectors, corrected his earlier testimony, and testified, as had Vaux and Nelson, that the engines were *stopped* at the *green light* and *reversed* at the *danger signal*. This testimony was as follows: R. 700-701.

"By Mr. Wood:

Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the Barry K, you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal—

Q. What is the correct testimony; what are the facts about that? When you saw the green light of the Barry K first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the Barry K, what did you do with your engines?

A. Full astern.

Q. Did you make an official report to the United States Inspectors along with Captain Vaux about this collision?

A. Yes, sir.

Q. And since you gave your previous testimony have you refreshed your memory by that report?

A I did.

Q. And does that report state the facts as you have now stated them?

A. Yes.

Q. Have you got that report with you?

A. I have.

Q. I will ask you to produce it.

A. I have got it in my coat pocket there."

(This report was marked "Respondent's Exhibit 12" for identification. R. 703. The Court reserved his ruling on its admission, and later admitted it. R. 861.)

Following this testimony of Norberg's and the reference to the Report, it occurred to the Court to check this testimony against the ship's Bell Book. So the following occurred:

"The Court: What does the bell book show as to the time when the engines were put at half speed and stopped?

Mr. Wood: It is 12:54, half speed, stop.

The Court: Q. So, Captain, the accident occurred to the nearest minute at 12:55?

A. Yes, sir.

Q. And at 12:54 to the nearest minute, which would mean, making all allowances, not more

than two minutes—or less than two minutes before was when you first saw the green light?

A. Just about. Less than two minutes.” R. 706.

The cross-examination and re-direct was as follows:

“By Mr. Young:

Q. Captain, does this bell book show or say anything with reference to your seeing the green light or red light, either one?

A. No, it doesn't show here.

Q. Well, all you see from the bell book is, first of all you see 12:50. What time is that what happened then?

A. That is full speed.

Q. What is that?

A. Full speed.

Q. That was full speed. Now, at 12:54, what next happened?

A. Half speed, stop.

Q. Half speed and stop?

A. Yes.

Q. And those came close together?

A. One bell after the other.

Q. One right after the other. The reason why you did any particular thing at that time does not appear in the bell book, does it?

A. No. It was just a precaution to stop at that time, saw a green light; no apparent danger at that time.

Redirect Examination

By Mr. Wood:

Q. You say there was no danger at that time?

A. At that time there was no danger.

Q. But you stopped out of precaution?

A. Yes.

Mr. Young: That is all.

Mr. Wood: That is all." (R. 707-708.)

The foregoing is all of the testimony about the stopping and reversing of the Pennsylvanian's engines. We have taken pains to quote it all to show this Court two things:

1. That except for Norberg's mistaken testimony, later corrected by the witness himself, the evidence is *unanimous* that the Pennsylvanian *stopped her engines* when the Barry K's green light first appeared, this stopping being executed by a half speed and stop order, the latter following immediately on the first, and really comprising one order.

2. But even if your Honors should ignore all of this evidence of the Official Report; of Vaux; of Nelson; and of Norberg corrected; and should choose to accept as true Norberg's earlier mistaken testimony,—in short, taking the record at its very worst possible for the Pennsylvanian—even so, there is *no testimony* to support the trial Judge's finding that the Pennsylvanian failed to

stop her engines at the first danger signal. For even Norberg's mistaken testimony says that they *were* stopped at that time; although the truth is they had been stopped earlier, and were *reversed* at the danger signal.

The exact words of the trial Judge's finding are that "The collision was the proximate result of negligent handling of *both* vessels in that they failed to *stop* engines when the 'Barry K' blew the first danger signal." R. 55 (*Italics ours.*)

Insofar as the Pennsylvanian is concerned, there is *no testimony to support this finding at all.*

(Parenthetically, we observe that, while it is usual for vessels to stop or reverse on a danger signal, the Rule does not require them to do so. Each case must depend on its circumstances.)

This finding of the trial Judge is the only holding that the Pennsylvanian was to blame. If that finding is reversed, as we think it must be, the Pennsylvanian must go free from any fault for this collision, unless your Honors should find some new fault against her. Therefore, we discuss now briefly her navigation and some of the charges made against her in the libel and contended for by the Barry K's counsel at the trial.

NAVIGATION OF THE PENNSYLVANIAN; AND CHARGES AGAINST HER

Boiled down, these charges are: (Libel, R. 7.)

That she failed to "heed" the "several whistle signals" of the Barry K for a starboard passing;

That she failed to heed the danger signals of the Barry K;

That she "crossed" the Barry K's signal of two blasts by blowing one;

That she failed to go to port to avoid the collision;

And (by amendment to the libel, R. 859), that she failed to drop her anchors to avoid the collision.

We discuss these briefly.

First, that the *Pennsylvanian* failed to heed the "several whistle signals" of the Barry K for a starboard passing. This presupposes, in the first place, that the *Pennsylvanian* received such a signal. As to the first of such signals alleged to have been blown by the Barry K, all of the *Pennsylvanian's* three navigating officers deny it. They say it was one blast, not two; that they confirmed it with each other in accordance with the regular practice on American-Hawaiian vessels, and indeed with good seamanship everywhere, R. 730; and then answered it with one. Their unanimous testimony should certainly be accepted that they

heard it as one blast. Their action in answering with one, and going to the right, is proof positive.

It makes no difference at all that the *Barry K may* have blown two blasts. For if she did, she took the risk of that signal not being heard and understood.

“The vessel which undertakes to proceed contrary to the” (narrow channel) “rule without an assenting signal from the approaching vessel, takes the risk of her signals not being heard and of her not having heard the signals of the other vessel.” *The Gerry*, 161 F. 413, 418.

Cf. *The Black Diamond*, 273 F. 811, “ * * * when a navigator takes this chance” (taking the left-hand side), “he violates the law and takes the risk.” P. 813.

Cf. also *The Transfer No. 10*, 137 F. 666, “* * * any vessel that goes up in that way” (left hand side) “violates the law and takes the risk. * * *”

Indeed, Reed himself admitted that the risk was his when he said that his signal was only a request, and that it was up to him to keep out of the way. R. 124-125.

The vagaries of sound are well known. Reed may have actually blown two short blasts (the rule is that they must be “short”); but so close together as, due to wind or atmospheric conditions, to sound actually as one. It is for this reason that navigators in day-time always try to observe the steam jets of the approaching vessel’s whistle so as to confirm the sound. R. 820, 823.

The very purpose of the rules requiring whistle signals to be *answered* is to show the first-blowing navigator that his signal has been understood. This, and the uncertainty of whistle sounds, are commented on in *The Lake Calvenia*, 279 F. 763, 768, as follows:

“The purpose of requiring one vessel to answer the signals of another is to avoid misunderstanding; to create certainty that the signals given are understood as given. If the giving of a signal implied understanding on the part of the approaching vessel, there would be no occasion for an answering signal. The very fact that the rules are so made that the answering signal must be given, or one indicating that the signal is not understood, is conclusive of the experience of navigators that signals may be frequently misunderstood, and *it is not wholly uncommon, even in the exercise of due care, to hear, in a quick, sharp two-blast signal, but a single blast.* Human nature is fallible, and prudent sailors are often so misled.”

And at page 769: “Her failure to interpret the signal of the Rogers correctly * * * I do not ascribe as a fault on her part.”

So whether the Barry K blew two blasts or not is immaterial. The important thing is: What did the Pennsylvanian *hear*? And that she heard but one is evident from the testimony of all three men on the bridge and from their own conduct in answering with one and going to the right.

But we do not concede that Reed did blow two blasts. He was navigating the boat all alone; he may have been sleepy; he may have been tired;

through monotony of a long job he may have thought he blew two when he only blew one, or as has been suggested, he may have blown them so close together that they sounded like one. We cannot tell. But to say that the Pennsylvanian did not "heed" the signal she *received* is simply going contrary to all the facts.

Now as to the alleged subsequent two blasts. Reed says that he repeated this signal. But it is quite apparent that what he blew was a confused rapid succession of blasts. Nobody seems clear as to how many there were. To the Pennsylvanian they sounded merely as a group of short blasts blown in rapid succession. And since the danger signal is not confined to four blasts, but is by the Rule an indefinite number, "not less than four," they took this to be simply a danger signal emphatically blown, and as soon as they heard it, they reversed. Reed says that he blew them (after receiving the Pennsylvanian's one), 4 and 2 and 4 and 2 (R. 115-116), meaning a danger signal and a request for a starboard passage repeated. His own Captain, Williams, did not hear them this way. R. 166-168. Neither did his witness, Fowler. R. 433. Neither did his witness, Young. R. 417. And even Reed is not too certain about it. For he says: "Well, I was giving two whistles first, the danger whistle and another two whistles, *which I gave several*," etc. R. 122-123. Even the Barry K's counsel had to admit that these whistles were "a little confusing." R. 554. If they were confusing to the counsel who had carefully

studied his case, is it any wonder that they sounded to the navigators of the Pennsylvanian as a succession of rapid blasts, "not less than four"?

The whole 12 of them (if, as claimed, they were 4 and 2 and 4 and 2) could easily have been blown in less than ten seconds. (The writer has tried it by his watch.) And Reed, having, apparently, at first delayed blowing them at all, "figuring any moment" the Pennsylvanian would swing and "proceed on down to my starboard side," R. 123, when he did start blowing danger whistles, did so with the realization that human life was in danger; for he sent his watchman, Kelly, to call his crew. So he probably blew them very rapidly. If, as he claims, he blew 4 and 2 and 4 and 2, it was no fault of the Pennsylvanian's that she did not so distinguish them.

But this is not important. Her failure to distinguish them is *entirely immaterial*. For on receiving those danger blasts, she immediately did the only thing she could do,—reversed her engines. Certainly she could not change the whole maneuver at that time and attempt to go to the left. With an ocean steamer 430 feet long, coming down with the current and already swinging to the right, that would have been impossible. We would not even mention it except that counsel argued for it at the trial.

She did all she could,—she reversed.

As was said in *The Gerry*:

“When they received notice by the two blasts that she did not intend to obey the rule, they immediately reversed full speed astern. This she was bound to do, and it was all she could do.” *The Gerry*, 161 F. 413, 418.

Or, as was said of *The Stavangaren* (the vessel in the *Pennsylvanian*’s position) which had “ported her helm and reversed her engines”:

“She did all that could be expected of her in an efficient endeavor to avoid collision.”

The Bilbster, The Stavangaren, 6 F. (2d) 954, 956.

We have now disposed of the charge that the *Pennsylvanian* failed to “heed” the several whistle signals of the *Barry K* for a starboard passing.

This discussion also disposes of the charges that the *Pennsylvanian* failed to heed the danger signals; that she “crossed” the *Barry K*’s signal; and that she failed to go to port to avoid the collision. An impossible and dangerous maneuver. R. 562; 516-517. Equally impossible would it have been to drop anchors; impossible and dangerous. R. 510-511; 591-592; 597-599; 880-881; 883-884; 889; 864.

This charge about the anchors was an afterthought. The libel was amended at the trial to make it. R. 859. The transparency of this charge may be left to the Record and your Honors’ per-

ceptions. To drop anchors would have been impossible, futile and dangerous, and we do not argue it. Except perhaps to add that, certainly, a ship doesn't have to stand by ready to drop anchors in anticipation that the other ship is going to disobey the Rule of the Road. She has a right to expect obedience. Cf. Norberg's testimony R. 510, " * * * we don't anticipate any trouble that we would have to let go the anchor every turn we make in the river."

"Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course, would return to it as soon as possible." *The Victory*, 168 U.S. at p. 426.

We wish to avoid burdening your Honors with too long a brief, and will close.

What could the Pennsylvanian have done to avoid this collision that she did not do? But that does not ask the question right. It is not what could she have done, in the light of after events. She might, for example, have avoided the collision by coming to a stop when she first saw the Barry K, a mile away; but there was no call upon her to do so. Or, for that matter, she might have avoided it by not coming down the river at all. But these are not the questions. The question is: What did she do, or omit doing, as the circumstances unfolded before her, that careful navigators would not have done or omitted?

Nothing. She kept to her own right. She answered the Barry K's whistle promptly. She stopped her engines, as soon as the Barry K's green light appeared, at least a quarter of a mile away (Vaux), a half a mile (Nelson). Having previously heard and answered a single blast from the Barry K, and mindful of the obligations of Article 25, her supposition that the Barry K's green light meant merely a temporary sheer was entirely justified.

"It" (a green light) "would only indicate some slowness in making the turn, or that the ship had perhaps taken a sheer which presently her port helm would overcome. As they watched her, they would every moment be expecting to see indications of the change to port helm. The last thing they would have a right to assume would be that those in charge of the *Acilia* were persistently determined to take the wrong side of the channel." *The Acilia*, 120 F. 455, 459.

The Pennsylvanian would really have been entitled to hold her speed. But instead, out of extra precaution, she stopped her engines. Sure evidence of careful navigation. Then, receiving a danger signal, she immediately reversed, put her rudder hard right, and almost went aground to avoid the collision. She blew the statutory 3 blasts to indicate "my engines are going full astern,"—evidence again of her compliance with every requirement of navigation. It was *she*, not the Barry K, who first reversed.

We do not know what more she could have done.

But certainly, if there *are* any doubts about her conduct, they must be resolved in her favor under the well known rule in the *Victory*. That rule has been applied so many times that your Honors probably know it by heart. But for convenience, we quote it once more:

“As between these vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

“The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U.S. 404, 409: ‘Indeed, so gross was the fault of *The Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, 147 U.S. 72, 85, and the *Ludvig Holberg*, 157 U.S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.’” *The Victory*, 168 U.S. 410, at p. 423.

This collision between the *Barry K* and the *Pennsylvanian* is, in many of its features, similar or identical with the *Victory*, the *Acilia*, and the *Bilbster*, all of which we commend to your Honors’ attention.

In the *Bilbster*, 6 F. (2) 954, the Court said, at page 956:

“We conclude that the *Stavangaren* was proceeding on the starboard side of the channel and the *Bilbster* was on her port, heading directly toward her. This called for a port to port passage, and the *Stavangaren* signaled accordingly. But the *Bilbster* kept swinging to the eastward, taking a course that ran her into the collision.”

Passing over some lesser faults of the *Bilbster*, the Court continued:

“Her prime fault, however, was in failing to pass port to port and in shearing from the westerly to the easterly side. This directly brought about the collision, and indeed made it impossible for the *Stavangaren* to get away.

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another. Then the obligations of the vessels with respect to passing was fixed. It was obviously a one-signal situation, and, if the *Bilbster* had been under control, there would have been no difficulty in carrying out the maneuver. The *Stavangaren* thought properly that the *Bilbster* would perform her obligations and pass port to port. She accordingly blew one whistle, and her signals indicated this. She did all that could be expected of her in an efficient endeavor to avoid collision. Port to port passing is a normal and proper navigation. A vessel is not entitled to assume that another vessel will pass her starboard to starboard until two whistles are blown and answered. The *Victory*, 168 U.S. 410, 18 S. Ct. 149, 42 L. Ed. 519; The *Johnson*,

76 U.S. (9 Wall) 146, 19 L. Ed. 610; *The Gerry* (D.C.) 161 F. 413; *The Wm. P. Palmer*, 261 F. 925; *The Florence*, 186 F. 57, 108 C.C.A. 159.

“It was error to oblige the *Stavangaren* to respond in part for the damages which followed from the collision, and the decrees will be modified so as to render the *Bilbster* solely liable.” Page 956.

In the foregoing quotation we particularly direct your Honors’ attention to the statement that:

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another. Then the obligations of the vessels with respect to passing was fixed.”

We do not quote this to inform your Honors of such a well known principle of admiralty law. Your Honors know it too well. We merely adopt it as a succinct statement. It is very apt here. If, when these two vessels first sighted each other, each had blown one whistle and planned to pass to the right, as Article 25 required, there would have been no collision. The reason there was a collision is that the *Barry K* violated that great Rule of the Road,—Keep To The Right. There is no rule more necessary for the courts to enforce. Nor any that more requires certainty in pilots’ obedience to it. Navigators must *know*

that the other fellow is going to obey it. He who does not obey it takes the risk. If collision occurs, the fault is his. The Pennsylvanian obeyed it. The Barry K did not. That was the fundamental cause of this collision.

Upon it followed that other equally dangerous and contributing cause,—Reed's gross negligence in failing to stop or check the speed of his boat in any way; but, instead, with blind stubbornness, continuing full speed ahead into the face of that very danger which his own signals had proclaimed.

Respectfully submitted,

ERSKINE WOOD,

WOOD, MATTHIESSEN & WOOD,

1310 Yeon Building,
Portland, Oregon,

*Proctor for American-Hawaiian Steamship
Steamship Company, Appellant and Appellee.*

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,

Appellant,

vs.

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,

Appellee,

and

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,

Cross-Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,

Cross-Appellee.

**BRIEF ON BEHALF OF WESTERN TRANSPORTA-
TION CO., APPELLEE AND CROSS-APPELLANT,
OWNER OF THE "BARRY K" and
BARGES 22 and 24.**

Upon Appeal from the District Court of the United States
for the District of Oregon.

DEY, HAMPSON & NELSON,
CLARENCE J. YOUNG,
800 Pacific Building,
Portland, Oregon,
*Proctors for Western Transportation Co.,
Appellee and Cross-Appellant.*

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PAUL P. O'BRIEN,

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No. 10,316

**In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,
Appellant,

vs.

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,
Appellee,

and

WESTERN TRANSPORTATION CO.,
a Corporation, owner of the Steamboat
"BARRY K," etc., and Barges 22 and 24,
Cross-Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY,
a Corporation, owner of the SS. "Pennsylvanian,"
her engines, boilers, etc.,
Cross-Appellee.

**BRIEF ON BEHALF OF WESTERN TRANSPORTA-
TION CO., APPELLEE AND CROSS-APPELLANT,
OWNER OF THE "BARRY K" and
BARGES 22 and 24.**

Upon Appeal from the District Court of the United States
for the District of Oregon.

Being mindful of the provisions of Rule 20, Sub-
division 3, of this Court we, in answering Appellant's
Brief, will make no statement of the case. Insofar,

however, as we find it necessary to controvert appellant's "concise abstract or statement of case", indication thereof will be made at appropriate places in the argument which follows.

APPELLANT'S SPECIFICATION OF ERROR I.

(App. Br., pp. 12 to 22)

Appellant charges that the trial court erred in not holding that prior to and at the time of the collision the "Barry K" and her barges were being negligently navigated on the lefthand side of the Willamette River in violation of Article 25 of the Inland Rules, and that this was a proximate cause of the collision.

ARGUMENT

It is a fact that from the time the "Barry K" entered the Willamette River until the moment of collision the "Barry K" was on its east or port side of the river. This circumstance, says opposing counsel (App. Br. p. 12), "was the primary, real and fundamental cause of the collision".

With this statement we are in total disagreement: First, because under proper application of Article 25 of the Inland Rules to the conditions existing at Post Office Bar, it was lawful for the "Barry K" to proceed up its left side of the stream; and, second, because under the circumstances the presence of the "Barry K" on

the east side was a mere condition in no way constituting the proximate cause of the collision.

Article 25 (33 U.S.C.A., Sec. 210) reads:

“In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.”

The quoted rule does not under all circumstances compel steam vessels to keep to their starboard side of the channel; rather such course is required only when “safe and practicable”. Cross-libelant concedes the accuracy of this interpretation by charging in the cross-libel that the “Barry K” failed to keep to that side of the fairways or mid-channel on their own starboard side, *when it was entirely safe and practicable for them to have done so*, all in violation of said Article 25.”

(R. 27) (Italics ours.)

The “Barry K” simply followed the permission granted by Article 25 to use its port side of the river because it was unsafe and impracticable for river boats to use the west side near Post Office Bar, whether such boats be proceeding up or downstream.

The question of safety and practicality is a matter of degree. Under some circumstances the minds of reasonable men will not differ in deciding whether a par-

ticular action is safe or unsafe. In other cases no such agreement is possible. When such issue arises, no proof is so cogent as the considered opinion of technical experts in the specific field under consideration—here those with years of experience in piloting both river and ocean vessels through the waters in question. We proceed to demonstrate that upon the overwhelming preponderance of the testimony the west side of the River at Post Office Bar was and is unsafe and impracticable for use by river boats, by reason whereof it has been the universal custom for such boats to use the east side of the river.

SAFETY AND PRACTICALITY

Counsel (App. Br. p. 13) casually remarks that a mere statement of the channel conditions “makes the ‘Barry K’s’ violation of the rule so obvious that it seems to us argument is almost superfluous”. Having so stated, counsel consumes fourteen subsequent pages in argument.

In fact no such conclusion can be reached from considering channel conditions and the testimony of the expert pilots in reference thereto. At Post Office Bar there is a long bend in the river, resulting in a deflection of the current so that the natural channel of the river lies along the west bank. True, the river is 1200 feet wide with a 30 foot channel 800 feet wide, and a 35 foot channel 700 feet wide. (See App. Br., p. 5.)

Ocean going ships using the river, however, draw as much as 33 to 35 feet (R. 314, 344), but even as to ships drawing only 27 or 28 feet, it would obviously not be safe to operate in the 30 foot channel since an insufficient factor of safety would be involved. It is to be noted particularly that the distance from the east edge of the 35 foot channel to the east shoreline—on the inside of the curve—is approximately 400 feet (R. 496-7).

The collision occurred in the early morning of February 1, 1941, at a point approximately 200 feet from the east shore (R. 118, 119). The current at the time was about a mile an hour. There is testimony that the breeze from the east was ten to fifteen miles per hour (R. 102, 166). Government Records of seven miles per hour are based upon observations made at Portland, not Post Office Bar.

The reasons why it was unsafe and impracticable for river boats to use the west side of the river will appear from the summarized statements of the testimony which follow:

Captain William A. Reed, Pilot of the "Barry K" had known that for the last 23 or 24 years river craft "without exception" proceeded up the left side of the channel at Post Office Bar (R. 102). The "Barry K" was a stern wheel river boat with an overall length of 190 feet (R. 91). Her superstructure extended 129 feet

along the hull (R. 92). The pilot house extended 34 or 35 feet above the water line (R. 92). The "Barry K" drew 2 feet, 8 inches of water, her barges, one being made up on the bow of the "Barry K", the other laid out on the port side slightly aft of the forward bridge, drawing each as loaded, 4 to 5 feet (R. 101). Each barge was 135 feet long, 35 foot beam, with deck house 20 feet high and 115 feet long (R. 93). The "Barry K" and her barges were, therefore, all light draught boats with superstructures making them particularly vulnerable to cross winds (R. 108). Contrast deep draughted ocean going steamers such as the "Pennsylvanian" which was over 400 feet long and drew, when loaded, a little over 29 feet (R. 466 and 486), and which, when only partly loaded as at the time of the collision, drew 15 feet forward and 19 feet aft (R. 466).

A boat proceeding upstream past Post Office Bar is rounding a long sweeping curve to its left. On the right or west side of the stream there is a dike at least 4,000 feet long with piling extending irregularly 3 or 4 feet out of the water (R. 104, 242). The "Barry K" with tows would have to keep the bow of the tow "better than 200 feet" out from the dike to be safe (R. 105). A flat bottomed river boat, going upstream on the west side, would be subject to side slipping from wind (R. 105). Displacement swells from ocean ships going downstream would present a hazard to such river boat if on the "outside swing". The same effect would not occur if the river boat were going up along the left shore or inside of the

curve (R. 106). Displacement swells make it likely that lines will part (R. 106). On the east side a river boat has 200 feet of shallow water where it can travel completely out of the channel for ocean ships and be protected against the prevailing east wind (R. 105). This protection is afforded by willows on the east bank which stand 20 feet above the water level (R. 134). The superstructure of the "Barry K" and its barges offered resistance to the east wind (R. 108). Following the collision the wind and current carried the barges downstream and across to the west side of the river opposite Post Office Bar rear (R. 120).

E. P. Williams, Master of the "Barry K", had had 33 years' experience on river boats in the Columbia and Willamette Rivers (R. 162). During this time it had been the practice for river boats to use the east side of the river "both ways" because it was safer for them to pass on the east side of the channel (R. 179).

N. W. Stayton, a Columbia River pilot who had handled ocean going ships for 20 years last past, but who had had 40 years' experience in various capacities handling different types of boats on the Willamette and Columbia Rivers, stated that it was neither safe nor practicable for river boats to use the west side (R. 194-5). On the east side the river boats would be "out of the way of traffic" (R. 198). During Stayton's 40 years of experience it had been the custom, well known to Columbia River pilots, for river boats to follow the

east bank (R. 199, 210). River boats, particularly if towing barges with quite a bit of wind resistance would, if using the west side and trying to keep away from ocean traffic, be carried by an easterly wind into the dike (R. 200). A tug such as the "Barry K" with barges would for safety be obliged to stay off the dike about 200 feet (R. 200-1-2). A deep draughted ocean ship going downstream on the inside on the bend would throw its displacement swell and kick water toward the up-river boat (R. 202). An easterly wind—even 10 to 15 miles per hour—striking a flat bottomed river boat with barges having high deck houses would cause side-slippage (R. 205). It is sometimes necessary for river boats to come upstream quartering at almost a 25° angle, thus requiring more water surface than if proceeding straight ahead. On the east side of the stream the river boat would to an extent be protected from the wind by an embankment and trees (R. 207). "You hardly ever go by there, but what you find from one to four or five tugs in that district." (R. 210) By using the east rather than west side of the river these tugs could keep out of the way of the ships (R. 208-9).

In former years when the channel was only 250 feet wide and ocean ships were passing each other, one had to stop while the other drifted by (R. 219). In later years with the channel 600 feet wide the speed at which ocean ships would pass each other depended upon the class of vessel being handled (R. 220). True, as Stayton said, and as counsel argues (App. Br. p. 14), ocean ships

pass port to port, but the hazard at the bend in the river would not apply in the same degree to ocean ships as to a river boat passing an ocean ship. The deep draught and tonnage of ocean ships make them far less susceptible to side-slippage (R. 236) than the shallow-bottomed river boats and barges with their high superstructures (R. 243). That tow boats meet each other and pass on either side as agreed (R. 150, App. Br. p. 14) is not significant because both are subjected to the same hazards.

Counsel makes much ado about Stayton's testimony that there is room in the channel for an upgoing river boat and a downgoing ocean steamer to pass port to port—*providing there is no other ocean steamer in the vicinity* (R. 225, App. Br. p. 16). But mere area of water is not the test. The natural hazards created by the bend in the stream, the prevailing easterly wind which varies in velocity from time to time and changes suddenly (R. 242), existence of the west dike, the shallow water on the east side where river, but not ocean, boats can go with safety, the presence of other traffic in the river, the fact that no pilot before reaching Post Office Bar can know what conditions will prevail there at a particular time—all these changing factors and conditions existing for years before the "Barry K" accident made imperative adoption of the universal practice for southbound river boats to use the east side of the river. The fact that for over 40 years this practice

has been generally, if not universally followed, of itself makes a violation thereof hazardous (R. 691).

Charles W. Ackerman had been a ship's pilot on the Columbia River since 1927, and between 1908 and 1927 was on river boats in some capacity in the Willamette and Columbia (R. 237). His knowledge of the uniform custom, generally known, (R. 247) for river boats to use the east side of the river had continued since 1908 (R. 240-1). It was not practical or safe for river boats to use the west side of the river (R. 238) because the wind coming up would push them ashore; likewise as to the back swell of a passing ship (R. 210). There is danger of being "set against" the 4,000 foot long dike on the west side (R. 242), the east wind coming up suddenly causing side-slippage of even loaded barges which are "like a sailboat" (R. 243). "Kick water from a ship's propeller would hit a river boat and barge going upstream on the west side in the bight." But if the river boat were going up the east side, the kick water would be going "just the opposite from what you are" (R. 244). The bank and willows on the east side of the stream "are just high enough to cut off the wind on the barges" (R. 246). More tow boats pass in the Willamette River between Multnomah Channel and the mouth of the Willamette than at any other point in the Willamette or Columbia Rivers. The greater the number of boats present, the greater the importance of applying factors of safety (R. 248). Assuming a 10 mile easterly wind, the tug and tow would have to keep her stern at

least 200 feet off the dike—the barges would have to extend out into the stream at a 45° angle (R. 253-6).

Charles Boone, now with the Port of Portland, had been a pilot of river boats since 1907. He had passed by Post Office Bar 4,000 to 5,000 times (R. 283). River boats to his knowledge have used the east side of the river since 1899 (R. 286). Asked whether from his experience it was safe or practicable for river boats to use the west side, Boone said:

“Well, that would all depend on who you meet coming down. In my opinion, if they give you plenty of room you might make it, but if you didn’t you are stuck.”

* * *

“My idea was always to eliminate the chance of an accident as much as possible and go up on the east shore.”

* * *

“ * * you are just taking a chance that the other fellow don’t give you enough room to get by, there, and, as I say, it is not a very nice shore to run along close to.”

Henderson B. Davis had operated river boats on the river in varying capacities since 1917 (R. 310). Although he went into the “lower river” twice a week “any-

way" (R. 310), he had never seen a pilot operate river boats on the west side around Post Office Bar except one Astoria boat (R. 311). Uniformly river boat men used the east side from the mouth of the Willamette to St. Johns Bridge (R. 312). Davis said: (R. 314)

"Well, when you see a ship coming down there, you don't know whether it is going to draw nineteen feet of water or thirty-five feet of water. And if you were in there close enough to the bank and the swells from the ship or the kick-up from the stern would come in against you with the tow, why it would set you over into the dike, if you was a couple of hundred feet off the dike and if the wind was blowing, there, and you had to slow down for your lines, to keep the ship swells from parting your lines, and the wind was blowing on that west bank, which it does quite often in the wintertime, why you would blow on that bank, on that west bank." (R. 317)

The piling in the dike on the west side, difficult to see at night (R. 327), presents a hazard to river boats because the bottoms of barges might be punctured thereby (R. 326). River tow boats can "go pretty near up to the (west) bank" (R. 327). The wind there is not as strong because of protection by trees (R. 328). A stern wheel boat side-slips more than a propeller boat (R. 329). Effect of a displacement swell would depend on the draught and speed of an ocean ship (R. 330).

A. T. Lowery had been a Columbia River pilot since 1927. From 1902 to 1927 he ran tow boats on the river (R. 343). River boats stayed on the east side of the river at all times since 1902 (R. 345). It was neither safe nor practical for river boats to "be over in that bend passing ocean ships" (R. 345). The current sets on the break-water along Sauvie's Island. The east wind will set a stern-wheeler and barges onto the break-water. The amount of displacement swell from an ocean ship depends on her speed and draught (R. 346-7). A river boat coming upstream on the east side has 400 feet in the clear of the ship channel in which it, but not the ocean ships, may travel (R. 348). If, when piloting an ocean ship downstream, Lowery should meet a river boat coming upstream on the east side, he would keep the river boat on the starboard side to prevent it from crossing his bow.

Louis L. Fowler, pilot on the Tug Cruiser at the time of the collision (R. 427), had been with Shaver Transportation Company since 1933 (R. 426). River boats used the east side (R. 437). True, as counsel argues, on cross-examination, Fowler said it was "much more convenient" for river boats to come up on the left side and that to do so was "the same as cutting corners" (R. 437-8, App. Br. p. 18). But Fowler also said that whether it would be safe or practicable for tugs and tows to go up the righthand side "would depend upon whatever is approaching." "If another vessel is coming or something, I wouldn't go under there under no circum-

stances * * * because I don't think it is any too safe."
(R. 443)

No witness for appellant made any denial categorically of the existence of this custom. Pilot Norberg of the "Pennsylvanian" admitted that river boats with tows used the east side in the night-time "fifty-fifty" (R. 498). In the daytime "we go all over them" (R. 499). In passing a tug with barges he would slow down his ocean going ship so as not to "embarrass the tug" (R. 508).

William Lumm, testifying for appellant, said that the majority of the barges "probably use the east side" * * * "coming upstream". In operating tow boats with barges up or down the river he himself used "either side" (R. 645). If he had a boat without much power he "wouldn't get anywhere" staying on the west side because there was at least a mile an hour more current on that than on the east side. This certainly would make a difference (R. 646). The stronger the wind, the greater the wind resistance offered by a boat like the "Barry K" and its barges. A breeze of 10 to 15 miles per hour from the east (as testified to by Captain Reed of the "Barry K") would, if the tug and tow were for any reason to stop, "blow you ashore eventually" (R. 652). Lumm admitted that near Mount Coffin, Washington, along Batchelor's Island, near St. Helens, and from Cleveland Dike to Walker's Island, near Stella, Washington, river boats with tows follow the left side of the river (R. 659).

L. O. Hosford was a regular pilot for American-Hawaiian Steamship Company (R. 661). However, out of 30 years' experience on the river, he had piloted tow boats only two years (R. 675). Ocean vessels are not as easy to handle as a river steamer with tow (R. 664). With a heavily laden ship of deep draught "you pretty near have to make up your mind what you are going to do a little ahead of time", particularly if the ship has the current with her (R. 665, 668). He admitted that the "majority of river boats passed ocean ships at Post Office Bar starboard to starboard" because "it is easier going over there" (R. 673).

From the great weight of the foregoing testimony, we submit that it was neither safe nor practicable for river boats to use the west side of the river at Post Office Bar. We summarize the natural hazards:

1. Shallow draughted boats are peculiarly subject to slippage when making an outside turn along this channel which lies along the west bank.

2. The current on the west side is swifter than on the east.

3. The dike on the west side constructed of piling over 4,000 feet long and of uneven height presents a hazard to boats if driven against it. On the east side there is a sand bank.

4. Between the east edge of the dredged 35 foot

ship's channel and the east bank is 400 feet of shoal water available for river boats, but unsafe for use by ocean going ships.

5. Prevailing winds are from the east. The greater their velocity, the heavier their impact against flat-bottomed river boats and barges with their superstructures. The effect of the wind on heavy, deep draughted ocean boats is substantially less.

6. A river boat going up the west side is exposed to the effect of the east wind, but if going up the east side the sand bank topped with willows and cottonwoods affords protection.

Added to the foregoing natural hazards are those incident to the presence of other boats on the river:

1. Ocean going boats are not so readily maneuverable as ocean going tugs, hence it is common sense for the light draughted river boats to keep as far out of the way of the ocean ships as the river boats' light draught will permit.

2. On the east side of the stream river boats can avoid the side-slipping effect of displacement swells and kick water from ocean vessels.

3. River tugs with tows are usually required to stop on meeting other ships to prevent breakage of their lines and while so stopped are at the mercy of the wind, current and propulsive effect of swells and kick water.

4. River traffic past Post Office Bar is heavy—so if two ocean ships meet there, a river boat simultaneously meeting the two ships would constitute a menace to all three ships.

5. Tugs with log rafts, which form a substantial portion of the river traffic, universally use the east side—such a tow, being 1,000 feet or so long, would block the entire channel. Uniformity of use promotes safety.

Counsel need not be fearful of “overstating” our position, which he says (R. 20) is “so novel”. It is apparent that the factors bearing upon safety and practicality are variable: Direction of wind, its velocity, amount of current in stream, nature of weather, stormy or clear, day or night, the nature, position and number of vessels at or near Post Office Bar when a particular river boat is about to pass.

Safety and practicality, therefore, do not *necessarily* depend on the conditions existing at a particular moment of time. To avoid chaos there was adopted a universal pactice for river boats to use the east side of the river. Such use is strictly in accord with the pilot rule. The Court would assume a serious responsibility were it to upset this practice of 40 to 45 years’ standing.

The authorities amply support the contentions heretofore made:

In *The Hustler*, 39 A.M.C. 998 (D.C.N.Y.), The “Hustler” passed through the bridge draw on its port

side of the narrow channel when the starboard draw was available for use. The Court, however, held that the course of "The Hustler" was justified upon the basis of a custom which in turn was based upon factors of safety. The Court said:

"* * * but the custom was for tows bound east, to pass through the north draw, as it was difficult for them to pass through the south draw, although such passage was possible, but dangerous.

"The canal, at the place in question, was a narrow channel, and the general rule is that in a narrow channel each vessel shall keep to her own starboard side. The narrow channel rule is not absolute, but applies only insofar as it is safe and practical. *Transfer No. 21*, 248 Fed. 459; *P. R. R. No. 35*, 1932 A.M.C. 779, 58 F. (2d) 170; *C. Gallagher*, 262 Fed. 97; *Felix Taussig*, 5 F. (2d) 612, 1925, A.M.C. 953.

"The evidence clearly shows that while on occasions the south draw of the Scotia bridge is used by tows bound east, it is not safe or practical, but must be used with great caution and is seldom used, except in cases of emergency."

In *The Komiles-Russell No. 4*, 35 F. Supp. 194 (D.C.S.D.N.Y.), the Court said:

"It is undisputed that there is a well recognized custom with respect to navigation in Hell Gate, in

the vicinity of Negro Point, which requires vessels to pass starboard to starboard on the flood tide.

“The main contention of the Russell tow is that the Komiles was attempting to pass port to port contrary to this custom. For the Komiles it is insisted that the Russell No. 4 was at fault for sounding a cross signal, and for not stopping and reversing her engines promptly.

“The navigation was in accordance with the custom in Hell Gate on the flood tide; * * * I think the Komiles was at fault for attempting a port to port passage. The established custom for the navigation of vessels in Hell Gate, in the vicinity of Negro Point, requires a starboard to starboard passage on the flood tide. This custom was proved at the trial, and is not disputed. It has also been recognized by a long line of cases in this circuit.”

Opposing counsel (App. Br. p. 22) says that the above “Hell Gate” cases are not in point because, as the name implies, the place “is an especially dangerous piece of water with a very sharp bend and extreme currents, and is governed by * * * the East River Statute”. Counsel’s distinction, however, is one of degree and not of kind. The significant fact is that because of factors of safety and practicability, the New York Courts did not in these cases apply the port to port passage rule.

Opposing counsel refers to *The Stephen R. Jones*, 27 F. (2d) 208 (App. Br. p. 21), in which the Court says:

“The local pilot custom on the lower Mississippi River is for the ascending vessel to come up under the points, in order to get the benefit of slack water, while the descending vessel runs the bends, keeping in or near the middle of the river, in the thread of the stream, to get the benefit of the current. This custom is of long standing, has received judicial sanction, and must be considered an exception to the pilot rules. *The Albert Dumois*, 177 U. S. 240, 20 S. Ct. 595, 44 L. Ed. 751; *The Esparta* (C.C. A.) 160 Fed. 289.”

In *The John D. Rockefeller*, 272 Fed. 67 (Cert. den. 266 U. S. 693), also cited by counsel (App. Br. p. 22), the Court said:

“The customs of the river are, of course, subordinate to the statutory rules and to the pilot rules; but, when not inconsistent with those rules, they should be observed for promoting both dispatch and safety, *and the violation of an established custom of this sort is attributed to a vessel as a fault.*” (Emphasis ours.)

“As all vessels navigating the Mississippi River should observe these rules and customs, navigators have a right to expect their observance by each other.”

Counsel attempts to distinguish the two above mentioned "Mississippi decisions" upon the ground that Article 25 is expressly omitted from the Mississippi Rules. It is true that Article 25, as such, was not involved in the Mississippi River cases, but in *The Stephen R. Jones* case, "The Jones" was held negligent "in failing to observe the starboard hand rule of the road to keep to the right". The quoted rule is substantially identical with Article 25. The same is true in the case of *The John D. Rockefeller*, *supra*.

In *Occidental, Etc. v. Smith*, 74 Fed. 261 (App. Br. p. 23), the Court disapproved an alleged custom for vessels entering the Golden Gate to take the north, or lefthand side, but significantly said:

"We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom."

In the instant case we have cited eleven reasons for the custom.

In *The Acilia*, 120 Fed. 455 (App. Br. p. 23), the vessel was held negligent for failure to stay on her starboard side of the fairway, but the Court said:

"and it was perfectly safe and practicable to obey the rule. * * * The testimony shows that there is no reason for such a violation of the rule."

Indeed, the Court also pointed out that there was no agreement among the pilots in respect to any variation from the rules.

In *The Booth*, 127 Fed. 453 (App. Br. p. 24), the primary question was whether the pilot rules, including Article 25, were in effect at the place of collision. Counsel relies upon the lower court's decision, which court did not find any actual existing custom based on safety or practicability. In the appellate court, however (see *The Booth*, 138 Fed. 303, 305) the Court used significant language:

“It is beyond the province of the courts to condemn a practice so notorious and so long continued that it must be presumed to be known to Congress and to the supervising inspectors, and yet has not been condemned by either of them.”

In the instant case the custom for river boats to use the east side of the river at Post Office Bar had existed for 40 to 45 years and, therefore, must presumably have been known both to Congress and the supervising inspectors and “yet has not been condemned by either of them.” The only attempt by opposing counsel to establish such condemnation concerned a hearing before the Local Steamboat Inspectors at Portland, involving a collision in 1938 between two motor river tugs, Tidepoint and MODOC, in which the issue of safety and practicability was not raised. Evidence in reference to the

Modoc was received by the Court herein subject to objection. Admittedly, no formal notification from the inspectors' office of the decision in *The Modoc* (irrelevant herein) was given to anyone other than the two pilots involved (R. 734, 737, 766).

In *The Transfer No. 10*, 137 Fed. 666 (App. Br. p. 24), the Court merely held that if the custom to use the port side of the fairway is based solely on convenience, it does not justify a departure from the usual rule; likewise, in *Lehigh C. & Nav. Co. v. Compagnie, Etc.*, 12 F. (2d) 337 (App. Br. p. 25), the Court said: "We do not think the custom proved * * *", and the discussion in the opinion is simply to the effect that custom, based upon convenience only, will not justify a departure from the usual rules.

We need, however, not leave the Ninth Circuit to find legal justification for the practice in the instant case. In *The Felix Taussig*, 5 F. (2d) 612 (C.C.A. 9th Circuit), a case with which opposing counsel is familiar because he was also counsel in that case, the facts were as follows:

The "Diamond-O", a river boat with oil barge in tow, was enroute downstream in the Columbia River approaching the river bend at Kalama, when she sighted the "Taussig", an ocean going steamer enroute upstream. The river boat went to the south, or its lefthand side of the river, entirely out of the dredged side of the

channel, both to give the ocean ship the entire channel and because if an attempt were made to pass port to port in the bend it would be hazardous by reason of the propinquity of certain municipal docks, a moorage ground, the course of the current, and the slippage which would result in making the turn. The "Taussig" also went to the south and a collision occurred. In the legal proceedings which followed the "Taussig" charged the "Diamond-O" with violation of Article 25 of the Inland Rules. Upon this issue the appellant court considered the testimony of expert pilots as justifying the conduct of the river boat and Master, and concluded that he was free from fault, saying:

"Although it is a close question, our best judgment is that under the facts it was not safe and practicable for the 'Diamond-O' to keep to the right side and pass 'The Taussig' port to port and, therefore, we think that the 'Diamond-O' was justified in undertaking to proceed contrary to the general requirements prescribed by Rule 25."

That starboard to starboard passages are not uncommon in the Columbia River has been judicially noted also in the case of *The Charles R. McCormick*, 20 F. (2d) 27 (C.C.A. 9th Circuit), cert. den. 275 U. S. 562, where the Court said:

"Signaling for a starboard passage in the lower reaches of the river was not uncommon."

PROXIMATE CAUSE

We believe from the great weight of the testimony that the "Barry K" had the right to be on the east side of the river at Post Office Bar at and before the time of the collision. Should the Court disagree with us, the fact remains that the position of the "Barry K" on the east side was a mere condition, not a cause of the collision.

Captain Norberg admitted knowledge of the custom of river boats, at least 50% of the time at night, to pass ocean going boats at this place starboard to starboard. He was therefore under a legal duty in the exercise of even the slightest care to know and expect that he might meet a river boat coming up the east side of the river. When Norberg first saw the "Barry K," the vessels were about a mile apart. During all of the time remaining before the collision occurred, they were in sight of each other. The distance between the vessels and the time elapsing while the intervening mile was covered, gave Norberg full opportunity to have avoided a collision. He did not do so because of his own obstinate determination to remain on the east side of the river.

In the early case of *The Britannia*, 34 Fed. 546, at 557, Mod. 42 Fed. 67, Orig. Decree Aff. 153 U. S. 130, the Court said:

"Aside from some special provisions making the non-observance of the statute in itself a ground of

liability, as in the British Act above referred to, the mere transgression of such a statute will not make the vessel liable where the disobedience of it *did not contribute to the collision*. And inasmuch as only the *proximate* causes of collision are deemed material, the mere fact that a vessel is on the *wrong side of the river does not* make her liable, *if there was ample time and space for the vessels to avoid each other by the use of ordinary care*. In such cases the cause of the collision is deemed, not the simple presence of the vessel in one part of the river rather than in another part, *but the bad navigation of the vessel, that, having ample time and space, might easily have avoided collision, but did not do so.*" (Emphasis ours.)

A violation of the East River Statute in New York (the statute having a similar purpose to Article 25) is not necessarily a fault creating liability as was held in *Syosset*, 71 F. (2d) 666:

"On the record before us we hold that the violation by the *Syosset* of the East River Statute was a '*condition*,' and not a *contributing cause* of the collision." (Emphasis ours.)

and also in *The No. 1*, 180 Fed. 969:

"We have heretofore had occasion to pass upon this and a similar statute, and to hold that violation of such statutory obligations is not a fault, if

it be only a *condition* and not a *cause of the injury* complained of. * * * We do not connect the Boody's violation of the statute causally with the accident." (Emphasis ours.)

Note the dissenting opinion of Circuit Judge Learned Hand in *The Penoles*, 3 F. (2d) 761:

"I agree that, though a vessel ignores the East River Statute, she is not at fault unless her position is a '*cause*,' and not a '*condition*' of the collision. *By that the books mean only this: That when the offending vessel has been seen in season, her position, though unlawful, is a fact with which all other vessels must reckon in their navigation.*" (Emphasis ours.)

Judge Hand had occasion to apply this principle in *The Ballhaven*, 72 F. (2d) 206, when he said:

"We have often held that if the offending vessel is visible by the other in time to shape her movements accordingly, and if she does not impede the other's navigation by her unlawful position, her fault has not contributed."

See also the *SS "Deutschland,"* 90 F. (2d) 454 (C. C. A. 2nd Cir.), a collision case. The Court said:

"The appellant argues that the *Deutschland* was on the wrong side of the channel as she was

proceeding, and therefore violated Article 25 of the Inland Rules * * * .

“But this violation would not have been followed by a collision if the Munargo had pursued the course which the situation required. In *The Bellhaven*, 72 F. (2d) 206, 207, where we held that the burden was upon the tug on the wrong side of the narrow channel to excuse herself for so navigating, we said: ‘We have often held that if the offending vessel is visible by the other in time to shape her movements accordingly, and if she does not impede the other’s navigation by her unlawful position, her fault has not contributed’.

“The *Deutschland*’s signals announced her intentions in navigating at a time when both vessels were approaching green to green. In *The California*, 250 F. 790, 792, we observed: ‘When a quarter mile apart the boats were on substantially opposite parallel courses, warranting a starboard to starboard passage, which the *McAllister* claimed, and the steamer did not accord. Therefore the latter is solely at fault’.”

Since Pilot Norberg of the “*Pennsylvanian*” first saw the “*Barry K*” a mile away, the movements of the tug being apparent thereafter, it was his own lack of care which insulated and made immaterial any conceivable fault created by the “*Barry K*’s” position in the river.

APPELLANT'S SPECIFICATION OF ERROR II.

(App. Br. pp. 29 and 30)

Appellant next charges that the trial court erred in not holding the "Barry K" and her barges negligently navigated in that the pilot was navigating the boat alone in the pilot house with the Master asleep—this proximately contributing to the collision.

ARGUMENT

Counsel cites no statute, pilot rule or judicial authority requiring a river tug to have more than one navigator in the pilot house. It is ridiculous to "contrast" the two vessels in respect to number of persons on each who were engaged in some phase of navigation. The tug was a river craft with a small crew. The "Pennsylvanian" was a large ocean going ship with a proportionately large crew and officer personnel. The "Barry K" did have two navigators, the Master and Pilot, but they served on different shifts. The "Pennsylvanian", even with the Master, Pilot and Third Officer on the bridge, Helmsman at the wheel, and the lookout forward was still so negligently operated as to cause the collision with the "Barry K".

Nothing in evidence suggests that the burden on Pilot Reed alone "to observe the approaching "Pennsylvanian", the ranges and shore beacons, determine his course, blow his whistles, listen for the "Pennsylvanian's", answer them, steer his ship and ring his sig-

nals to the engine room" (App. Br. pp. 29, 30) was anything more than a routine duty readily performed by a single pilot of 23 or 24 years' experience in handling river craft.

Reed had previously been Master of the "Barry K", but in December before the collision he had relinquished this place to Captain Williams merely because the latter was an older man with the Western Transportation Company and under Company rules had seniority rights over Reed (R. 99, 100, 163). There is nothing except counsel's dogmatic supposition to suggest that the "Barry K" would have been navigated differently if Captain Williams had been in the pilot house. The "Barry K's" whistle for a starboard passage was not surprising to Captain Williams (R. 166). He affirmatively testified that had he been in the pilot house, he, also, would have piloted the "Barry K" upon the east side of the channel (R. 180). If five men on the "Pennsylvanian" assisting in her navigation succeeded only in causing collision with the "Barry K", mere absence of numbers of men in the pilot house on the "Barry K" has no significance whatsoever.

APPELLANT'S SPECIFICATIONS OF ERROR III TO VIII, BOTH INCLUSIVE.

(App. Br. pp. 31-45)

Although the above specifications of error aggregate six in number, they really present in different forms

and with corollaries the contention that the trial judge erred in holding that the "Pennsylvanian" did not stop her engines at the first danger signal from the "Barry K".

ARGUMENT

Counsel says "what confused the trial judge (in reaching the conclusion that the "Pennsylvanian" did not stop her engines at the first danger signal) was a conflict in Pilot Norberg's testimony" (App. Br. p. 32). Actually the only "confusion" involved was that on the part of Norberg—confusion which started when he was piloting the "Pennsylvanian" past Post Office Bar, and which remained with him on the witness stand. As the trial judge in his "Memorandum of Decision" (R. 40) said:

"The pilot of the 'Pennsylvanian' claimed in his corrected testimony that he ordered full astern on hearing the first danger signal, but the circumstances of the case persuade me that he did not take this action at the time stated."

In considering the circumstances of the case it is instructive to start with the testimony of Norberg himself. Norberg told several different and conflicting stories in respect to the stopping and reversing of the engines on the "Pennsylvanian". In the first place on direct examination Norberg testified: (R. 467, 468.)

"Mr. Wood: Q. Who blew the whistle on the Pennsylvanian?

A. I did.

Q. The tug at that time was showing her red light?

A. Showing the red light. And slowed down, half speed; then we got the danger signal from the tug, a group of short blasts and couldn't tell how many it was, they was coming too fast, too close together. Then we stopped and we got another group of signals and I ordered full astern."

Here Norberg said the "Pennsylvanian" slowed at the "Barry K's" red light, stopped at its first danger signal and went full astern at the second danger signal.

Subsequently and still on direct Norberg testified: (R. 475.)

"When did you answer that one blast?

A. Oh, about half a minute, less than that; ten seconds after I heard the blast, after we had conferred.

Q. After you had conferred?

A. Yes.

Q. Now, when you answered that one blast, did you get an immediate response from the 'Barry K'?

A. No, not right away.

Q. But sometime later you got what?

A. I got a group of blasts.

Q. And what did you do then?

A. I slowed down.

Q. And then what?

A. And held my course along the land there and stopped."

Here Norberg said he slowed down at the first group of blasts, stopping later. Continuing with direct, Norberg testified:

(R. 476, 477)

"Q. How close were you to her when you were forced to the conclusion she was not going to swing back on her course but that there was some danger of collision?

A. About 800 feet or more perhaps.

Q. Then what did you do?

A. Full astern."

Here Norberg had the vessels 800 feet apart when he gave the order full astern.

On cross-examination Norberg testified: (R. 513, 514)

"Q. Now, at the time that you heard this first group of blasts from the 'Barry K', how far was the Pennsylvanian from her?

A. Well, I guess a couple of thousand feet anyway.

Q. A couple of thousand feet?

A. Yes, all of that.

Q. At that time what orders did you give?

A. Either half speed or stop.

Q. Did you give the orders for half speed or stop at that time?

A. Half speed or stop, I said.

Q. Which did you do?

A. Well, we will call it half speed, then.

Q. Call it half speed."

Here Norberg wasn't sure whether at the first group of blasts from the "Barry K" he gave the order half speed or stop, but oscillated in favor of half speed.

Note that in this last quoted testimony, Norberg heard the first group of blasts when the vessels were "all of" 2,000 feet apart. Compare this estimate with that of Captain Reed who approximated the distance at 2,500 to 3,000 feet (R. 114). Elsewhere Norberg said he was "a good half mile or more" from the "Barry K" when he "started to slow down" (R. 507).

Norberg's testimony, above quoted, was completed Friday, July 18, 1941 (R. 462, 556). On Tuesday, July

22nd, obviously after consultation with counsel, Norberg gave his so-called "corrected testimony" as follows: (R. 700, 701)

"Q. Captain Norberg, in my going over the transcript of your testimony the other day, I noticed you testified that at the time you received the first danger signal from the 'Barry K', you put your engines at half speed and stopped and I want to ask you if that testimony is correct?

A. No. I had the engines stopped before that, when she showed the green light and when I saw the danger signal —

Q. What is the correct testimony; what are the facts about that? When you saw the green light of the 'Barry K' first, what did you do with your engines at that time?

A. Half speed and stop.

Q. That is when you saw the green light first?

A. Yes.

Q. Then when you received the first danger signal from the 'Barry K', what did you do with your engines?

A. Full astern."

Counsel (App. Br. p. 34) says:

"The real truth is that the 'Pennsylvanian's' en-

gines were stopped as a precaution when the 'Barry K' first showed her green light."

Yet in his "corrected" testimony Norberg first said it was "when she showed the green light *and* when I saw the danger signal". (Italics ours.) Counsel then interrupted Norberg to ask the same question in relation to the green light, omitting reference to the danger signal. After all this effort, the "corrected testimony", above set forth, was finally adduced.

The above quoted separate portions of Norberg's testimony are convincing because of their confused and contradictory nature. Counsel apologizes for "Norberg's mistaken testimony, later corrected by the witness himself" (App. Br. p. 44). Nevertheless, we believe it clear that Norberg's testimony at the trial merely reflected his own uncertain actions while at the pilot wheel of the "Pennsylvanian".

Reliance is placed by opposing counsel on the joint report made by Norberg and Vaux to the United States Steamboat Inspectors on the day of the accident (App. Br. p. 35). This report—obviously a studied one—asserts that when the "Barry K" showed her green side light, she was still far enough away to resume her port to port passage. Although at least Captain Vaux at that time saw "nothing to become alarmed about" (R. 574), nevertheless, the report says: "We slowed to half speed and stopped." Moreover, neither the report nor

the bridge bell book referred to therein shows the distances which the vessels were apart during the various stages when they were in sight of each other before the collision.

Opposing counsel seeks to bolster the unsatisfactory testimony of Norberg by that of the "clear and accurate witness" Vaux, corroborated by Third Officer Nelson, the substance of whose testimony was that the ship's engines were stopped when the "Barry K's" green light first appeared and were later reversed immediately on receipt of the "Barry K's" danger signal. This "clear and accurate" testimony was checked against the "Pennsylvanian's" bridge bell book.

The entry in that book for slowing and half speed was 12:54 A.M. (R. 587). The entry for the time of collision was 12:55 A.M. (R. 587). Taking these items at face value, it would appear that from the time slowing of the "Pennsylvanian" began until the collision only one minute elapsed. Somewhere in that interval the "Pennsylvanian's" engines are said to have been reversed (R. 587, 588).

But Norberg and Vaux were extremely careful to point out not once but repeatedly that "the bell book is only to the nearest minute" and "although the collision is recorded * * * to the nearest minute, at 12:55, the interval between reversing full speed astern, rudder hard right, and the collision was considerable" (R. 588).

Thus, the period between the slowing down and collision was stretched, as the trial Judge noted, to "within less than two minutes" (R. 706, 707). Under all the circumstances, however, it is not credible that the transaction occurred in only a minute of time or even "within less than two minutes".

The "Pennsylvanian" on coming in sight of the "Barry K", according to Norberg, was proceeding at seven knots (approximately eight miles) (R. 508), the "Barry K" at six miles per hour (R. 116). The vessels thus approached each other at a combined speed of approximately fourteen miles per hour. If these speeds had remained constant to the collision, the vessels would have cut down the intervening distance at the rate of 21 feet per second or 1,260 feet per minute. If the vessels were a mile apart (5,280 feet) when they first came in sight of each other, four minutes and twelve seconds would have elapsed before the collision.

But allowance must be made for the fact that their speeds were not constant. Within the last thousand feet the "Barry K", according to Reed, cut its speed from six miles per hour to "almost a complete stop" (R. 116, 118). The "Pennsylvanian's" speed throughout some indeterminate distance between a fourth of a mile and 2,000 feet or more before the collision (R. 513, 514, 559) was reduced from seven and one-half or eight knots to three and one-half or four knots, according to Vaux, or to "a little headway", according to Norberg (R. 514,

580). It is obviously impossible to compute accurately the elapsed time by making allowance for slowing, but it is apparent that the overall time substantially exceeded four minutes and twelve seconds, the lengthening of that time occurring during the latter part of the passage.

Norberg said he heard the first group of blasts, that is, the first danger signal from the "Barry K" when it and the "Pennsylvanian" were "a couple of thousand feet anyway" apart (R. 514). If, during that 2,000 feet or more of distance, the average combined speeds of the vessels approaching each other were assumed to be half their previous speed, say seven miles per hour, then they approached each other at twelve feet per second, or 720 feet per minute. On this assumption three minutes would have been required for the vessels to come together within that 2,000 feet of distance.

However, the "Pennsylvanian's" bell book fixed the interval of time between the "Pennsylvanian's" slowing down and the collision at one minute, or, according to the corrected testimony, "less than two minutes". Thus, if the bell book governs, the signals for half speed or stop were not given at the time Norberg saw the "Barry K" 2,000 feet or more away, but at some later time. According to Reed, the vessels were 2,500 to 3,000 feet apart when he sounded the first danger signal. Adopting this testimony in light of the bell book entries would induce the conclusion that the "Pennsylvanian" did not stop for an even greater

period of time after the "Barry K's" first danger signal was blown. It is, accordingly, not difficult to understand why the trial judge, who observed the demeanor of the witnesses upon the stand, the confusion and uncertainty of Norberg, the studied, careful explanations of Vaux, and the contradictions of Norberg even after a week-end of study with counsel, was persuaded by the circumstances of the case that Norberg did not order full speed astern "at the time stated", namely, when he received the first danger signal from the "Barry K". Indeed, the "Pennsylvanian" did not at that time even stop. The record amply supports the finding of the trial court upon this subject.

APPELLANT'S SPECIFICATION OF ERROR IX.

(App. Br. pp. 28 and 29)

Appellant charges that the trial court erred in failing to hold that the "Barry K's" "persistence in keeping on the lefthand side and failing to stop or reverse her engines when she knew the dangerous situation had arisen" was a fault for which the "Barry K" should alone be responsible. We reserve argument upon this subject until consideration *infra* of Cross-Appellant's Specification of Error I, which involves the same subject matter.

CROSS-APPELLANT'S SPECIFICATIONS OF ERROR

We assume the subject matter of this litigation has now been sufficiently covered that no "Concise Abstract or Statement of the Case" is either necessary or proper in respect to the cross-appeal. We, accordingly, merely set forth the Specifications of Errors on which cross-appellant relies, which specifications are the same as those stated in its Assignment of Errors (R. 75-77) and in its Statement of Points (R. 904). Cross-appellant assigns errors in the proceedings, decision and decree of the trial court as follows:

"1. In holding that there was negligent handling of the 'Barry K', constituting a proximate cause of the collision in that it failed to stop engines when the 'Barry K' blew the first danger signal.

2. In holding that Western Transportation Company should pay one-half the difference of the damages sustained by the 'Barry K' and 'Pennsylvanian'.

3. In holding that American-Hawaiian Steamship Company should recover by way of recoupment one-half the amount which American-Hawaiian Steamship Company was required to pay cargo on Barges Nos. 22 and 24.

4. In holding that American-Hawaiian Steamship Company should recover from Western Transportation Company any damages whatsoever.

5. In requiring Western Transportation Company to pay its own costs.

6. In failing to hold that the 'Barry K' was carefully navigated at all times; that it was free from fault, and in not entering decree in favor of Western Transportation Company accordingly.

7. In failing to hold that the 'Pennsylvanian' was solely at fault in respect to the collision.

8. In failing to hold that the 'Pennsylvanian' was at fault in not giving proper or any heed to the several whistle signals by the 'Barry K' for a starboard passage, and that this proximately caused the collision.

9. In failing to hold that the 'Pennsylvanian' was at fault in crossing the starboard passing signal of the 'Barry K' with port passing signal, which circumstances proximately caused the collision.

10. In failing to hold that the 'Pennsylvanian' did not ascertain the position of the 'Barry K' or take steps to avoid the collision, thus proximately causing same.

11. In failing to hold the 'Pennsylvanian' at fault in not changing her course to port, but continuing to starboard and toward shallow water, and that she thereby proximately caused the collision.

12. In failing to hold that under all circumstances then present the 'Pennsylvanian' was proceeding at an immoderate rate of speed and thereby proximately caused the collision.

13. In failing to hold that the 'Pennsylvanian' was at fault in not using the open and available main ship's channel at and before the time of the collision, thereby proximately causing the same.

14. In failing to hold that the 'Pennsylvanian' was at fault in not having available a competent person to drop the anchors, and in failing to drop the anchors, thereby proximately causing the collision.

15. In failing to decree recovery by Western Transportation Company from American-Hawaiian Steamship Company of Western Transportation Company's entire damage." (R. 75-77)

CROSS-APPELLANT'S ASSIGNMENT OF ERROR I.

(R. 75)

The trial court erred in holding that there was negligent handling of the "Barry K", constituting a proximate cause of the collision, in that it failed to stop engines when the "Barry K" blew the first danger signal.

The foregoing is the only finding by the trial court of negligence on the part of the "Barry K". If the Court agrees with our view that this finding was in error, and that the "Barry K" was not otherwise at fault, but sustains the trial court's finding of fault on the part of the "Pennsylvanian", then it would appear that Cross-Appellant's Assignments of Error II, III, IV, V, VI, VII and XV should be sustained. In other words, upon the assumption stated, the last cited assignments follow as corollaries to a reversal of the finding referred to in Assignment I. No further argument will be presented in respect to the other assignments just mentioned. Discussion of Cross-Appellant's Assignment of Error I includes Appellant's Specification of Error IX.

ARGUMENT

We have pointed out that the mere presence of the "Barry K" on the east side of the river was a condition not the cause of the collision. It follows that the movements of the vessels thereafter are the only factors properly to be considered in determining what was the proximate cause of the collision. The question then is: Did the "Barry K", after seeing the "Pennsylvanian", adopt a course which can be said to have constituted a fault?

When it appeared that the "Pennsylvanian" was making no immediate effort to swing to its port side of the stream, Captain Reed was faced with one of three choices: First, stop quickly as possible; second, attempt to cross the bow of the "Pennsylvanian" and proceed to the "Barry K's" west side of the stream; third, get into the shallow water on the "Barry K's" east side as quickly as possible and out of the path of the ocean going ship.

To stop immediately involved hazards. After such stop, the "Barry K" would probably have still been in the path of the "Pennsylvanian", which Reed said appeared to be moving twice as fast as the "Barry K" (R. 120). When stopped, Reed would not have had the same control over his tug and barges that he would have had underway. There were the current of the river and the east cross wind to be considered. Actually Reed did stop, or almost so, before the collision, but the

"Pennsylvanian" hit the starboard side of the leading barge just the same. (R. 469).

To cross the bow of the "Pennsylvanian" was likewise hazardous. The "Barry K" was already well over on the east side. A sharp swing to her starboard would have been necessary. Based upon his 24 years' experience, Reed had every reason to suppose that the "Pennsylvanian" would ultimately swing to her own west side of the river—as ocean going vessels invariably did when passing upbound river tugs with barges or tows.

To get into shallow water on the east side as quickly as possible seemed and was the sensible course. Captain Reed could not know what the approaching steamer drew, or how heavily laden she might be, but obviously she was a large ship and might well draw 25 to 30 feet or more. He rightly assumed the "Pennsylvanian" would at least remain in the channel. Clearly Norberg intended to remain in the channel (R. 494-497). By "channel", he meant the 35 foot channel, the east edge of which was 400 feet from shore (R. 495, 497). No deep sea vessel "goes up there", but a light draught river boat could proceed through that 400 feet of water in entire safety to itself (R. 497). The point of collision was only 200 feet from the east bank. Vaux said: "I still wonder why the "Pennsylvanian" didn't go ashore because the trees were visible there of the shore line." (R. 550) That the "Pennsylvanian" did not actually go ashore is undoubtedly explained by the fact that instead of drawing her maximum of 29

feet, she was drawing at the time only 15 feet forward and 19 feet aft (R. 466). Norberg had the entire 35 foot ship channel to his left, but he went to his right. Reed testified:

“Q. Will you state to the Court why, after you gave your first danger signal to the Pennsylvanian, you did not stop your engines and throw them in reverse immediately?

A. Well, I was giving two whistles first, the danger whistle, and another two whistles, which I gave several, figuring any moment he would understand the two whistles, he would swing back into his regular course and proceed on down to my starboard side.

Q. Had he done so, would there have been any reason for a collision?

A. No sir.

Q. And proceeding over toward the east side, where were you going with reference to the channel?

A. I was going directly away from the channel, to the east side of the channel.

Q. And in that particular area of the river, could heavy-draft vessels travel?

A. They did right at that place, but not farther where I was trying to get.” (R. 122, 123.)

True, Captain Reed on cross-examination said that he did not get to the place he aimed to reach in order to be safe (R. 123), but this testimony was based upon facts which he learned after the accident and not the facts which he was obliged to consider just before the accident. He reasonably believed that the "Pennsylvanian" could not reach him when the "Barry K" was 200 feet from the east edge of the river.

Counsel says: "It needs no precedents of decided cases to condemn such conduct as this and we cite none." (App. Br. p. 29) Actually, the case of *The Felix Taussig*, supra, not only does not condemn such conduct, but in that case the river boat was exonerated from blame in following a course similar to that adopted by Captain Reed. The Court said: (5 F. (2d) 615, at pages 614 and 615.)

"At once, then, the practical situation became this: The Diamond-O, about to leave the channel, had signaled by two blasts that she intended to pass to starboard, instead of port, but got no assent or signal of any kind. What ought the Diamond-O to have done? Persisted in her course over into the shoal water, supposing that the Taussig would approach in the channel, or repeated signals and made certain that the Taussig had heard and understood? The answer is, as a precautionary act, she ought to have repeated her signals. The Victory, 168 U. S. 410, 18 S. Ct. 149, 42 L. Ed. 519; The Three Brothers, 170 F. 48,

95 C. C. A. 322. But, though the Diamond-O may be criticized for not taking that precautionary measure, still, if it appears that her action in that respect did not contribute to the result, and that the immediate sole cause of the collision was negligence on the part of the Taussig, then the Taussig, and not the Diamond-O, should be held liable.

“The evidence is that the two blasts of the Diamond-O were heard by the lookout of the Taussig, and that at that time the Taussig was just below the bend, commencing to swing on the ranges, probably a few feet off; her green light showing to the Diamond-O, and the pilot of the Taussig observing the side lights of the Diamond-O. At that time the vessels, by evidence and chart markings, must have been at least half a mile apart. Therefore, if the Taussig had obeyed the two whistles blown by the Diamond-O and heard by the lookout, there would have been no collision, for she would have kept to the dredged channel, while the Diamond-O, keeping her course, passed out of the dredged channel to the shoal water.”

In *The Taussig* the Court says that when the “Diamond-O” “persisted in her course over into shoal water” on her left, she was subject to criticism for not taking the precautionary measure of repeating her two blast signal. Nevertheless failure to repeat this signal was said not to have contributed to the result. Reed, however, did repeat the two blast signal, not once, but twice (R. 123).

Moreover, Reed said the "Pennsylvanian" blew only two whistle signals. The first was the "Pennsylvanian's" one blast in answer to the "Barry K's" initial two—this when the vessels were 2,500 to 3,000 feet apart (R. 114). The second whistle from the "Pennsylvanian" was a reverse engines signal of three blasts when the vessels were approximately 1,000 feet apart (R. 117). At that point of time Reed said: "I immediately reversed my engines full speed and blew three whistles." (R. 117) Just before reversing, the vessels being a little over 1,000 feet apart, Reed had stopped his engines (R. 116). By the time the collision occurred the "Barry K" and barges "had come substantially to a stop" (R. 118).

We submit that under all of the circumstances and conditions which then faced Reed, he acted with reasonable prudence in the course which he adopted, and that the trial court's finding of fault was in error.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR VIII.

(R. 76)

The trial court erred in failing to hold that the "Pennsylvanian" was at fault in not giving proper or any heed to the several whistle signals by the "Barry K" for a starboard passage and that this proximately caused the collision.

ARGUMENT

Reed first saw the two white mast lights of the "Pennsylvanian"; shortly afterwards he saw her star-board light and knew she was coming down on the Post Office Range (R. 112). Then, according to Reed, substantially corroborated by John Kelly (R. 448), followed a series of whistle blasts at distances which may for convenience be tabulated as follows:

WHISTLE SIGNALS	Approximate Distance Between Vessels.
"Barry K" sounds two blasts.	3000 to 4000 feet (R. 113,125)
The SS "Pennsylvanian" ten seconds to half a minute later (R. 475) answers with one blast.	
"Barry K" sounds four blasts, eight or ten seconds after the "Pennsylvanian's" one blast. No answer.	2500 to 3000 feet (R. 113,114,125)
"Barry K" sounds two blasts. No answer.	2000 to 2500 feet (R. 115)
"Barry K" sounds four blasts. No answer.	2000 feet (R. 115)
"Barry K" sounds two blasts and stops engines.	1000+ ft. (R. 116)
SS "Pennsylvanian" sounds three blasts.	1000 feet (R. 117)
"Barry K" reverses engines and sounds three blasts.	Less than 1000 feet (R. 117)

It will be observed that the distance the vessels were apart had been cut down by about 1,000 feet between the "Barry K's" two blast signal and its first four blast or danger signal (R. 126). At speeds of eight and six miles respectively for the ship and tug, it required 47 seconds to close this interval. The subsequent interval between the "Barry K's" first danger and second starboard passing signal was 500 feet, traversed in about 23 seconds; similarly as to the interval between the "Barry K's" second passing and its second danger signal. Next was an interval of 1,000 feet before the third starboard passing whistle by the "Barry K". It was during this period that the vessels were slowing down so that what otherwise would have been a 47 second interval to cover the last mentioned thousand feet was extended substantially.

If, therefore, those on the "Pennsylvanian" were mistaken as to the nature of the "Barry K's" first passing whistle, they could not have been mistaken as to the second or third passing whistles with substantial intervals between and blown at times when the vessels were approaching within easier hearing distance of each other. The identical starboard passing whistles repeated three times should by repetition have meant something to Norberg and the members of his "huddle".

But counsel says:

" * * * it is quite apparent that what he (Reed) blew was a confused rapid succession of blasts.

Nobody seems clear as to how many there were.”
(App. Br. p. 49.)

Nobody? What about Reed and Kelly? Lookout Swearingen on the “Pennsylvanian” made no claim of being unable to distinguish the whistles from the “Barry K”. He heard whistles from both ships, but said he simply didn’t remember what the whistles on either vessel were (R. 770). Even Norberg identified the “Barry K’s” second signal as a “group of blasts” consisting, as he said, of five or six blasts which he understood to be a danger signal (R. 513). He similarly identified the second “group of blasts” as a danger signal (R. 516, 517). He should have had no difficulty identifying the two blast signals for a starboard passage.

It may be, as counsel says, that “the whole twelve of them (if, as claimed, they were 4 and 2 and 4 and 2) could easily have been blown in less than ten seconds” (App. Br. p. 50). But if they had been, the approach which for the last 3,000 to 4,000 feet obviously consumed over four minutes, would have been characterized by silence and not by a “confused rapid succession of blasts”.

The “Pennsylvanian’s” disregard of the three starboard passing whistles by the “Barry K” was obviously a factor proximately contributing to the accident.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR IX.

(R. 76)

The Court erred in failing to hold that the "Pennsylvanian" was at fault in crossing the starboard passing signal of the "Barry K" with a port passing signal, which circumstance proximately caused the collision.

ARGUMENT

Although the trial court's finding of negligence on the part of the "Pennsylvanian" was failure to stop her engines when the "Barry K" blew its first danger signal (R. 55), the fault of the "Pennsylvanian" really began at an earlier point of time. It is conceded that when the vessels were about three-fourths of a mile apart, the "Barry K" gave a whistle signal to the "Pennsylvanian"—the issue of fact being whether that signal was one blast for a port to port passage or two blasts for a starboard to starboard passage.

Obviously a determination of this issue is important since if the first signal by the "Barry K" was two blasts, the "Pennsylvanian's" answering signal, which admittedly was only one blast, violated Article III of the Pilot Rules (See *infra*) which forbids "cross signals", that is, "answering one whistle with two and answering two whistles with one". The duty of the "Pennsylvanian" on receiving the "Barry K's" two blast signal was either to respond with two blasts, thus

acceding to the request for a starboard to starboard passage, or, if she did not understand the signal or declined to accede, she should have blown a danger signal of at least four short blasts. See Rules II and III, Pilot Rules Act of Congress, approved June 7, 1897 (Exhibit 8, pp. 6 and 7).

The great weight of the testimony supports the statement of Captain Reed that his initial signal was two blasts for a starboard to starboard passage. Reed blew these blasts and, therefore, was in the best position of anyone to know the nature thereof (R. 112). The Master of the "Barry K", although in bed, heard the two blasts (R. 166). The watchman, John Kelly, on the "Barry K" heard them (R. 446); likewise as to deckhand John H. Williams (R. 388). The Mate, Raymond Peck, heard the starboard passing whistles, although he didn't remember "what rotation they were in" (R. 379). Louis E. Fowler—the only wholly disinterested witness—Captain of the Shaver Transportation Company's tug "Cruiser" which was following the "Barry K" over a mile downstream, "heard the 'Barry K' blow two whistles" (R. 431).

The probabilities favor the accuracy of the testimony just cited. In view of the custom for river boats to make starboard passages with ocean going ships off Post Office Bar, there would have been no object in Captain Reed signaling for other than a starboard passage.

Opposing counsel says the "unanimous testimony" of those on the "Pennsylvanian" was that they heard only one blast (App. Br. p. 46). This statement is not accurate. The Quartermaster at the wheel of the "Pennsylvanian" was not called as a witness, nor did opposing counsel obtain his deposition. Neither was Wayne Swearingen, the lookout on the bow of the "Pennsylvanian", called to the stand or his deposition taken (R. 768). There is, however, before the Court the fact that three days after the accident Swearingen testified before the Local Steamboat Inspectors that he didn't remember whether the first signal from the "Barry K" was one or two blasts (R. 770). It is important that this lookout, whose position on the "Pennsylvanian" was 200 feet forward of the bridge (R. 523), did not corroborate the statements of Norberg, Vaux and Nelson that the first whistle they heard was one blast.

Serious doubt is cast on the credibility of Norberg in respect to his testimony that the first signal from the "Barry K" was one blast of the whistle (R. 467). Before the Steamboat Inspectors Norberg was asked: "When you heard that one blast of the whistle, did the Third Mate mention it to you?" Norberg replied, "Yes" (R. 491). But at the trial of the instant case Norberg testified that in accordance with a customary rule on American-Hawaiian ships "I asked the Captain * * * was that one blast?" The Captain said, "Yes". "I also asked the Third Officer 'Did you hear that there was one blast?' 'Yes', he said." So, it was Norberg who

asked the question, not the Third Mate who volunteered the information (R. 475).

A curious sort of "customary rule" this! Remember there was no fog being encountered—no storm, nothing to suggest the necessity of requiring the pilot to confer with other bridge officers to obtain confirmation of what the pilot heard—that is, nothing except doubt in the mind of the pilot which he, of course, denied (R. 475). This "huddle" practice seems to have been peculiar to American-Hawaiian ships. Norberg, who had worked for only one other company, the Luckenbach (R. 483), didn't remember any such practice with the Luckenbach (R. 489). True, Henry C. Dyer, who incidentally had never piloted any kind of a vessel on either the Willamette or Columbia Rivers, thought that confirming whistle signals was customary on any ship—but this was only an expression of opinion, not a statement of fact (R. 730).

"The vagaries of sound" which counsel says are "well known" (App. Br. p. 47) were clearly not vagaries to those on board the boat from whose whistle the sounds were emitted. If those on the "Pennsylvanian's" bridge failed to hear them correctly, it was not because they were not blown correctly. As between the positive testimony of those who said they heard two blasts of the "Barry K's" whistle, this being the testimony of the only disinterested witness Fowler, and the negative testimony of those who heard only one blast, the former should be taken in preference to the latter for it is posi-

tive against negative testimony. See *The Finn-McCool*, 147 Fed. 123; *The Winecco*, 39 F. (2d) 970, aff. 48 F. (2d) 1076. Moreover, the important issue is not what the officers of the "Pennsylvanian" say they heard, but what those officers in the reasonable exercise of their auditory senses ought to have heard. *The G. V. Luckenbach*, 197 Fed. 888, 892. *The Texas*, 226 Fed. 897, 903. Clearly they were at fault and that fault contributed to the accident.

Opposing counsel cites *The Gerry*, 161 Fed. 413, 418 (App. Br. p. 47), in support of the contention that where the vessel proceeds contrary to the narrow channel rule, it takes the risk of her signals not being heard. This contention applied to the instant case begs the question, for the "Barry K", as above pointed out, was not violating the narrow channel rule, but rather was proceeding in accordance with that rule, for within the meaning thereof it was neither safe nor practicable to make a port passage.

CROSS-APPELLANT'S ASSIGNMENTS OF ERROR X, XI, XII, AND XIII.

(R. 76)

These assignments will be considered together because they all relate to movements of the "Pennsylvanian" which proximately caused the collision: Failure to ascertain position of the "Barry K", continuing to

starboard instead of to port, immoderate speed, and failure to use the open and available main ship's channel.

ARGUMENT

Extended argument at this point would involve unnecessary repetition. We make only the following observations:

1. Counsel says: (App. Br. p. 6)

“It is not possible for a steamer in the ‘Pennsylvanian’s’ position to tell at that distance (approximately a mile) which side of the slightly curving river the upcoming boat is on.”

Contrary to counsel’s further contention, the “Pennsylvanian” had no right to assume that the upcoming boat would take the right side—if the boat were a tug, particularly with tow, because of the custom heretofore detailed. Knowing the approaching boat was a tug with tow, Norberg also knew there was at least a fifty-fifty chance that it would come up the east side of the river. Therefore, it was Norberg’s duty to ascertain the position of the “Barry K” in order to avoid possible collision. Although there is no evidence that the “Barry K” in fact took a sheer, both Norberg and Vaux on seeing the “Barry K’s” green light supposed she had taken a sheer, but would “right herself” and pass port

to port (R. 476, 546). The "Pennsylvanian", being uncertain of the position or intended maneuver of the "Barry K", was not at liberty to maintain its course and speed. Even in the case of an admittedly "privileged vessel", such vessel has no absolute right to keep her course and speed regardless of the danger involved; there is never a "right of way into collision". *Postal Steamship Corporation vs. SS. El Isleo*, 308 U. S. 378; 84 L. ed. 335. (See addenda infra.) The "Pennsylvanian" never gave a danger signal to the "Barry K"—only a reverse engine signal when the vessels were about a thousand feet apart (R. 117).

2. If the Court is satisfied that the passing signals given by the "Barry K" were for starboard and not port passing, then while the vessels were still 3,000 to 4,000 feet away, the "Pennsylvanian" was on notice of what the "Barry K" proposed to do—an intention not changed because the same signal was repeated three times. Moreover, the "Barry K" was showing her green light (R. 476, 546) for an appreciable length of time—indicating that she was heading farther toward the east side of the river. Reed said he was continuously bearing to the east side (R. 114, 116). All the facts before the "Pennsylvanian" indicated that the "Barry K" intended a starboard passage—yet the "Pennsylvanian" failed to alter her course to port, but continued to starboard toward the trees on the east bank.

3. Just after leaving the city limits, the "Pennsylvanian" increased her speed above her previous rate of

four knots. This was when Norberg first saw the "Barry K" a mile away (R. 506). He continued for a minute or two, gaining perhaps three or four miles per hour. At full speed he would have attained twelve knots (R. 506, 507). He well knew that it was important to reduce his speed back to three or four knots in order not to break the lines on the "Barry K" when passing her (R. 508). Yet he continued full speed ahead for a "good half mile or more" (R. 508). It being night and Norberg professedly uncertain of the intended course of the "Barry K", the speed of seven to eight knots while approaching the "Barry K" was immoderate under the circumstances.

4. The entire main channel was at the "Pennsylvanian's" immediate left. Only shoal water was to be anticipated on the right, yet the "Pennsylvanian" failed to use the open and immediately available main ship channel.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR XIV.

The trial court erred in failing to hold that the "Pennsylvanian" was at fault in not having available a competent person to drop the anchors and in failing to drop the anchors, thereby proximately causing the collision.

ARGUMENT

The stopping of a vessel is by no means wholly a matter of stopping and reversing her engines. In an emergency the dropping of an anchor may well avoid the collision which the operation of the ship's engines alone fails to avoid.

Admittedly the "Pennsylvanian" was equipped with two anchors on her forecastle head (R. 510). Admittedly those anchors were in physical condition to be used that night (R. 510). Admittedly if someone had been on the forecastle head in charge of the anchors and had received orders to drop the same it would have been possible for him to "get it out right away" (R. 512) or within "probably half a minute" (R. 852).

But it is also a fact that there was no one on the forecastle head in charge of the anchors at the time. To have someone there would have required as a preliminary matter calling a man out of his quarters and having him walk or run about 200 feet along the deck to the anchors—a process requiring four or five minutes (R. 512). Significantly, the Chief Officer, who would have handled the anchors, had been on the forecastle head while the vessel was still in the city limits, but was dismissed about five minutes before the collision occurred (R. 550). The ship's officers were careful to exercise ordinary precautions in this regard as far as the city limits—thereafter they were willing to take

their chances, and this notwithstanding Norberg's admission that he had to allow for the contingency of accidents (R. 510).

With no one on the forecastle head in charge of the anchors it would no doubt have been futile for Norberg to have ordered the anchors dropped. He gave no such order at any time (R. 512) and the anchors were not dropped. While we are aware of no statutory requirement that vessels operating in narrow channels shall be prepared at all times to drop their anchors, yet that this is a customary and proper precaution to be taken in the handling of large ocean going ships in confined spaces is established by the testimony. Use of this precaution is referred to in reported collision cases. See *SS. "Deutschland"*, 90 F. (2d) 454, 455; *The Texas*, 226 Fed. 897, 901.

If there had been a qualified man on the forecastle head who could have dropped the anchor immediately upon timely command from the bridge, the collision would probably have been avoided. The "Pennsylvanian's" officers said the ship was traveling at seven to eight knots per hour before her engines were stopped or reversed (R. 508, 579). Proceeding downstream at seven knots without dropping anchors, the ship could, from the time her engines were put in reverse, have stopped in approximately one-half mile (R. 508, 850). If, however, at the time the engines were put in reverse, the anchors had been promptly dropped, a ship of the

"Pennsylvanian's" class would, according to Captain Lowery, have stopped in one-half the distance, that is, in one-fourth of a mile (R. 850). Likewise, according to Captain Lowery, if the "Pennsylvanian" had been traveling four knots an hour, from the time her engines were put full speed astern, she could have stopped in half the distance required if the anchors were not used (R. 851). Captain Orwin G. Graham, who had piloted American-Hawaiian ships for three or four years, during which time he had to the best of his knowledge piloted the "Pennsylvanian", substantially corroborated Captain Lowery (R. 850, 851). It is further to be noted that if the port anchor on the "Pennsylvanian" had been dropped, the tendency would have been to pull the vessel to port (R. 854) and thus have assisted in diverting her from the starboard course which ultimately resulted in the collision.

As stated, Norberg said the "Pennsylvanian's" maximum speed before the accident was seven knots (R. 508). He started to slow down when the "Barry K" was "a good half mile or more away" (R. 508). He said he heard the first group of blasts (the first danger signal) when the two boats were "all of" 2,000 feet apart (R. 514), at which time he gave the order for "half speed" (R. 514). (This statement was subject to Norberg's "corrected testimony".) At the time of the collision, according to Norberg, the "Pennsylvanian" had a little headway—"She wasn't moving very fast" and she was "swinging away from" the "Barry K" (R. 515). If the "Penn-

sylvanian" had received "a little" assistance from dropping of the port anchor, it is demonstrably clear that the forward movement of the "Pennsylvanian" would have been at least retarded enough that she would have stopped or veered to port and have avoided the collision. Captain Vaux put the "Pennsylvanian's" maximum speed at seven and one-half or eight knots, with the speed reduced at the time of collision to three or three and one-half knots (R. 579, 580). It is all the more apparent from Vaux that the forward movement of the "Pennsylvanian" would have been substantially checked with the use of her port anchor. Thus the "Pennsylvanian's" fault in not making use of its anchor was a fault contributing proximately to the collision.

Opposing counsel says the matter of anchors was an afterthought (App. Br. 51). This is not true. What was or was not done with the anchors on the "Pennsylvanian" was peculiarly within the knowledge of the "Pennsylvanian's" officers. The issue naturally came up on cross-examination of appellee's first witness, Captain Norberg (R. 510-511). Dropping of an anchor was merely one method of taking proper steps to avoid a collision or of slowing the vessel down within the issues as made out in the libel (R. 7 and 8). The Court properly permitted the questions to be answered. The amendment was made, with the Court's approval, at the close of the testimony merely as a precautionary measure and after counsel had raised the issue (R. 855).

THE MAJOR AND MINOR FAULT RULE.

Counsel leans heavily upon the pronouncement in *The Victory*, 168 U. S. 410, 423; 42 L. ed. 528 (App. Br. p. 54), viz:

“As between these vessels, the fault of *The Victory*, being obvious and inexcusable, the evidence to establish fault on the part of *The Plymothian* must be clear and convincing in order to make a case for apportionment.”

This pronouncement must be read in light of the factual background. “*The Victory*”, headed down Elizabeth River, at first on the right side thereof, attempted—for no good reason—to cross the course of “*The Plymothian*” which was bound upstream on its own right side thereof. There was no suggestion that it was unsafe or impracticable for “*The Victory*” to hold to her right side. The contrast between the facts in *The Victory* and those in the instant case, already fully discussed, is obvious.

Counsel also quotes from *The Bilbster*, 6 F. (2d) 954, 956 (App. Br. p. 55), as follows:

“In determining faults, it is well to start about learning the obligations of the vessels at a time when they first saw or sighted one another.”

We have no quarrel with this statement; we agree therewith, but we disagree with counsel’s attempted application thereof to the instant case. “*The Stavan-*

garen" was headed upstream near the Narrows in New York Bay, on her starboard side of the channel, "The Bilbster" was on her port, outward bound. In the collision which followed "The Bilbster" was held solely at fault because she failed to pass port to port and sheered from the west to the easterly side of the stream. As in the case of "The Victory", "The Bilbster" involved a crossing.

Counsel in attempting to apply the above quotation from *The Bilbster* fails to consider the obligations of the "Pennsylvanian" at the time when she first saw the "Barry K". Although Norberg's view of the "Barry K" in the last mile stretch was unobstructed, Norberg was in doubt as to the "Barry K's" position and movements. Although Norberg saw two white mast lights, indicating to him a tug with barges, he fancied that a third mast light, which would have indicated a log raft behind, might have gone out (R. 471, 502). Although there is no evidence that the "Barry K" took a sheer, yet both Norberg and Vaux said they supposed it had. Although Norberg admitted knowledge of the likelihood that river boats might be coming up on the east side, nevertheless, he purported to be surprised that the tug was there. Although three starboard passing whistles were blown by the "Barry K", Norberg had to converse with ship's officers as to the nature of the first—he disregarded the other two. Although the "Barry K" sounded a danger signal at 2,500 to 3,000 feet and again at 2,000 feet, Norberg did not slow or stop the "Pennsylvanian's" engines until the ships were 1,200

to 1,500 feet apart, the "Pennsylvanian's" engines not being reversed when this distance had been reduced to 800 feet. This failure to make a timely stop and reversal of her engines when the "Barry K" blew the first danger signal, in itself prevents application of the major-minor fault rule to the "Barry K". Indeed, if that rule has any application, it would be against the "Pennsylvanian", whose course from the time the vessels came in sight of each other involved a veritable comedy of faults.

* * * * *

No consideration has been given to the matter of lights on the "Barry K's" barges because whatever their technical status, opposing counsel admits they did not contribute to the collision (R. 3) and no error is assigned in respect to this subject (R. 9-11). Damages are not in issue—they were stipulated (R. 53, 54). Assuming this case were properly one for divided damages, the form of the final decree is correct (R. 59-61). *The Chattahoochee*, 173 U. S. 540; 43 L. ed. 801. *Erie Railroad Co. vs. Erie & Western Transportation Co.*, 204 U. S. 220; 51 L. ed. 450.

CONCLUSION.

Our contentions may be summarized under three main propositions:

1. The "Pennsylvanian" was clearly at fault in the particulars assigned, which fault constituted a proximate cause of the collision.

2. By custom, based upon factors of safety and practicability, the "Barry K" had the right to be where it was at and before the time of collision.

3. If the Court should disagree with the proposition last above stated, still the "Barry K's" position on the river was not the proximate cause of the collision, but a mere condition. Thus, the Court is concerned only with the conduct of the pilots in view of the circumstances respectively facing each.

We submit that this Court should enter a decree denying to American-Hawaiian Steamship Company recovery of any damages whatsoever from Western Transportation Company, but awarding to Western Transportation Company recovery of that Company's entire damage from American-Hawaiian Steamship Company.

Respectfully submitted,

DEY, HAMPSON & NELSON

CLARENCE J. YOUNG,

Proctors for Western Transportation Company, Appellee and Cross-Appellant.

ADDENDA TO PAGE 59.

The Yoshida Maru, 20 F. (2d) 25 (C. C. A. 9th Cir.).

The West Hartland, 2 F. (2d) 834 (C. C. A. 9th Cir.).







